(28)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 410
Criminal.

LOUIS H. EGAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

THOMAS BOND,
Attorney for Petitioner.

October 2, 1943.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Louis H. Egan prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled case on August 9, 1943, affirming the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on September 9, 1943, when the said Court without opinion denied petitioner's petition for a rehearing (R. 1278).

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet. It will be found at page 1231 of the record herein.

STATUTES INVOLVED.

The statute involved (hereinafter called the Act) is Title I of the Public Utility Act of 1935 entitled, "An Act to Provide for Control and Regulation of Public Utility Holding Companies, and for Other Purposes" (49 Stat. 803, Title 15, U. S. C. A., Sec. 79). The indictment charges conspiracy (Title 18, U. S. C. A., Sec. 88) to violate Sec. 12-H [Title 15, U. S. C. A., Sec. 79-L (h)] of the aforesaid Public Utility Act of 1935. Section 12-H reads as follows:

> "It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—
>
> "(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or
>
> "(2) to make any contribution to or in support of any political party or any committee or agency thereof.
>
> "The term 'contribution,' as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution."

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Title 28, U. S. C. A., Sec. 347, and the Act of March 8, 1934, relating to criminal cases, Title 28, U. S. C. A., Sec. 723-a, also 18 U. S. C. A., Sec. 688, and Rule XI promulgated pursuant thereto). See cases cited under Reasons for Granting the Writ, page 8.

QUESTIONS PRESENTED.

1. Is section 12-H of the act a valid exercise of the power of Congress, under Article I, Section 8, Clause 3 of the Constitution, to regulate commerce among the several states?

2. Under the doctrine of separability, can any part of section 12-H be upheld?

3. Can the language of section 12-H be enlarged by construction to include contributions made to persons not candidates for office, but "made in contemplation of such persons becoming candidates," and was it error for the Court to so charge the jury (R. 1258, 161, 1187)?

4. Is the Court of Appeals' opinion, upon the sufficiency of the evidence (R. 1239-47), untenable and in conflict with the decisions in other circuits?

5. Did the Court err in refusing petitioner's requested instruction No. 14, thereby refusing to submit petitioner's theory on a disputed issue of fact (R. 1257, 160, 1175)?

6. Was Mortimer's testimony as to petitioner's expense account (which the court below held to have been erroneously received [R. 1253-4]) prejudicial (R. 80, 782-3)?

7. Was evidence of the political practices of North American Light & Power Company, with which petitioner was not connected, admissible against petitioner (R. 123, 1001-4)?

8. When Spoehrer's ex parte affidavit confessing his part in the alleged conspiracy (Govt. Exh. No. 70, R. 821-7) was read in petitioner's presence, did petitioner's mere silence make the affidavit admissible in evidence against him (R. 1252-3, 70, 441-3)?

STATEMENT.

Petitioner was indicted January 17, 1941, in the Eastern District of Missouri, jointly with Union Electric Company of Missouri, upon eight counts, count 1 charging conspiracy to violate section 12-H quoted supra, and counts 2 to 8 charging specific violations of said section (R. 16-31). Over petitioner's objection, the defendants were tried jointly and petitioner was acquitted on counts 2 to 8, but convicted on count 1. The defendant Union Electric Company of Missouri was convicted on all counts. Petitioner was sentenced by the District Court to two years imprisonment and to pay a fine of $10,000, and this judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, in the opinion and judgment here sought to be reviewed.

The Union Electric Company of Missouri and petitioner prosecuted separate appeals to the United States Circuit Court of Appeals for the Eighth Circuit. The appeals were heard, however, upon a joint record, were argued together, and decided in one opinion (R. 1231). Separate applications to this Court for certiorari are made because the specifications of error differ in some respects.

The constitutionality of section 12-H was duly challenged in the District Court (R. 200, 202, 212, 910, 916, 1200, 1205 and 1206), among other reasons because it was not within the powers granted Congress by the Constitution, and its prohibitions, particularly as to intrastate contributions made locally to candidates for state and substate office, and to state committees for state elections, were not within any granted power, and encroached upon the powers reserved to the states. Adverse rulings of the District Court were duly assigned as error and urged on appeal (Egan's Assignments of Error I, R. 68; V, R. 71; VIII, R. 72; XXXIV, R. 152; LVI, R. 166). The Court of

Appeals for the Eighth Circuit held section 12-H to be a valid exercise by Congress of its constitutional power (R. 1239).

In its charge to the jury the District Court permitted them to find that payments of money to persons not at the time candidates for office were in violation of section 12-H if "made in contemplation of such persons becoming candidates for office" (R. 1187). This charge was wholly unsupported by any evidence and was a misconstruction of the statute. Petitioner excepted to it (R. 1195-6) and urged the error on appeal (R. 161), and the Court of Appeals disallowed same (R. 1258).

A question of fact arose at the trial as to whether or not petitioner's contributions to the Republican National Committee were made from a salary paid him by the Union Colliery Company or were from his personal funds. The District Court refused to submit petitioner's theory on this issue to the jury (Egan's refused instruction No. 14, R. 1175), and petitioner urged this error on appeal (R. 160), and this assignment was disallowed (R. 1257).

Against petitioner's objection, Government witness J. D. Mortimer was permitted to testify that F. J. Boehm told him that Egan's expense account was inflated, and that Boehm placed a cross mark over it to so indicate (R. 782-3). The Court of Appeals upheld petitioner's contention that this evidence was inadmissible, but further held that this evidence, attributing, as it did, dishonesty to petitioner, was "favorable rather than prejudicial," and refused to reverse (R. 1253-4).

Other incompetent and irrelevant evidence, with which petitioner was not connected—particularly the former political practices of North American Light & Power Company (R. 1001-4)—the prejudicial character of which was stressed in brief and argument, was not mentioned in the opinion of the Court of Appeals.

An affidavit made by Herman Spoehrer (Govt. Exh. No. 70, R. 821-7) containing conclusions implicating petitioner, was permitted to be read in evidence against petitioner, on a mere showing of petitioner's silence when it was read before a group of six persons, including petitioner (Rec. 441-3), and petitioner's assignment of error on this point was disallowed by the Court of Appeals (R. 1252-3).

Petitioner likewise questioned the sufficiency of the evidence to support the conviction, and the Court of Appeals held the evidence sufficient (R. 1247). In reaching this conclusion the court below applied a test of criminal liability in conspiracy cases that conflicts with decisions in other circuits.

There is no similarity between this case and Boehm v. U. S., 123 Fed. (2d) (8 Cir.) 791, referred to in the opinion below (R. 1241). Boehm was not charged with violation or conspiracy to violate section 12-H. He was tried only on the charge of perjury while testifying as a witness before the S. E. C. The Court held that the unconstitutionality of section 12-H was no defense to his perjury, and that he could not raise the question (l. c. 801, pars. 7, 8, and l. c. 809, pars. 20-23). None of the constitutional or other questions here presented were either considered or decided in the Boehm case.

Such further facts as are necessary will be stated under Reasons for Granting the Writ and in the argument in the brief supporting this petition.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

1) in holding that section 12-H of the act is a valid exercise of the power of Congress to regulate commerce among the several states;

2) in failing to hold the portion of the District Court's charge to the jury, permitting them to find payments made to persons not candidates for office, to be in violation of section 12-H, if made in contemplation of such persons becoming candidates, to be erroneous, not supported by the evidence, and reversible error;

3) in failing to hold the refusal of petitioner's requested instruction No. 14 to be reversible error;

4) in failing to hold that the receipt of Mortimer's testimony, concerning petitioner's expense account and Government Exhibit No. 115 (a) (R. 785) in connection therewith, to be prejudicial as well as erroneous;

5) in failing to hold the testimony as to political practices of North American Light & Power Company, to be inadmissible against and prejudicial to petitioner;

6) in failing to hold the admission of the Spoehrer affidavit (Government Exhibit No. 70, R. 821) to be reversible error;

7) in failing to hold the evidence to be insufficient to convict, and in not directing petitioner's discharge.

REASONS FOR GRANTING THE WRIT.

(1) This Case Presents Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

(a) The constitutionality of section 12-H.

Expounding the Constitution is, of course, the highest type of federal law, and such a question is met at the very threshold of this case. The indictment is grounded upon section 12-H, quoted supra herein, and, if that section is invalid, the whole prosecution fails. This is a matter of great public importance. It is the first time in its history that Congress has undertaken to regulate political practices pertaining to state and substate elections, and not done through the mails or by any means or instrumentality of interstate commerce.

The section is not confined to federal elections—**U. S. v. Classic,** 313 U. S. 299—nor is it confined to contributions made by mail or by any means or instrumentality of interstate commerce—**U. S. v. Darby,** 312 U. S. 100, syl. 7, l. c. 112-7—nor is it confined to such contributions as may affect interstate commerce—**U. S. v. Wrightwood Dairy Co.,** 315 U. S. 110, l. c. 116. On the contrary, it is an all-inclusive prohibition, including within its comprehensive terms purely intrastate contributions to candidates for state, county and municipal office, or to state or local committees for state or local elections, and there is no declaration in the act, nor any finding by Congress or any administrative agency that the purely local contributions prohibited affect interstate commerce, or that they have any close or substantial relation thereto. We shall endeavor to point out in our brief that Congress is without power to so legislate. We submit that the question of whether or not it has such power is one of great public importance which should be settled by this Court.

When the constitutionality of sections 4(a) and 5 of the act was challenged, this Court considered the question of sufficient importance to warrant certiorari—**Electric Bond & Share Co. et al. v. S. E. C. et al.**, 303 U. S. 419—and, more recently, when the constitutionality of section 11 (b) of the act was challenged, this Court granted certiorari—**The North American Company v. S. E. C.**, October Term, 1942, now pending in this Court.

In **Landis et al. v. The North American Co.**, 299 U. S. 248, at page 256, this Court spoke of cases involving the enforcement of the Public Utility Act as "cases of extraordinary public moment" and, further, "in these holding company act cases, great issues are involved, great in their complexity, great in their significance"; and, further, "on the law there will be novel problems of far-reaching importance to the parties and to the public."

We respectfully submit that the question of the validity of section 12-H is at least as important and of far more public interest than any of the other sections of the act.

Other federal legislation relating to political contributions has always been expressly limited to federal elections [The Hatch Act, Title 18, U. S. C. A., Secs. 61-61(t), and particularly Sec. 61 (m), 54 Stat. 772, and the federal Corrupt Practices Act, Title 2, U. S. C. A., Secs. 241-256, particularly Sec. 251, 43 Stat. 1074].

The attempt, under Section 12-H, to reach political practices at state and substate elections, certainly presents novel problems of far-reaching importance. Many individuals who are officers and employes of utility corporations like to participate as other citizens do in the elections through which our democracy functions. In view of the provisions of Section 12-H, they now do so at the risk of any contribution or activity they may make or engage in being considered as made or done "by or on behalf of the corporation" and, hence, risk indictment. Surely, this question of the federal power over the citizen's right to

engage in political activity in state and local matters is one that should be settled by this Court.

Further, the question is one of great importance to the states because, if Congress may, under the commerce power, regulate political practices at state and substate elections, nominations or appointments, then the power is complete, plenary and exclusive—**Gibbons v. Ogden,** 9 Wheat. 1, l. c. 196—and all state legislation in conflict therewith would be invalid. Nearly all of the states now have corrupt practices acts, and it is important to state legislators that they know how far Congress can go in preempting this field.

We say, therefore, that the constitutionality of Section 12-H presents a federal question of great importance which should be settled by this Court.

(b) **This case also presents the question of whether or not any part of Section 12-H can be upheld under the doctrine of separability.**

It is probably within the power of Congress to prohibit contributions to candidates for federal office—**U. S. v. Classic,** 313 U. S. 299; it may be within the power of Congress to prohibit political contributions by use of the mails or instruments of interstate commerce—**U. S. v. Darby,** 312 U. S. 100. It is not within the power of Congress to prohibit contributions made "otherwise" than by mail to condidates for state and substate offices (U. S. v. Reese, 92 U. S. 214, l. c. 217, 218, 221; James v. Bowman, 190 U. S. 127, l. c. 139-142; Lackey v. U. S., 107 Fed. [6th Cir.] 114, l. c. 117, 118, 121).

The act contains a separability clause, Sec. 32 (Title 15 U. S. C. A., Sec. 79Z-6). We deny that any part of Section 12-H can be upheld. The presence of a separability clause merely reverses the presumption against divisibility. Notwithstanding the presence of such a clause, the unconstitutional part will not be separated and the bal-

ance sustained when, as in this case, the provisions sought to be stricken out are essential to the legislative purpose, or are so interwoven that the separation of the valid and invalid parts is impractical, or where there is a clear probability that with the invalid part eliminated, Congress would not have been satisfied with what remained (Williams v. Standard Oil Co., 278 U. S. 235, l. c. 241, et seq.; Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, Syll. 4, l. c. 361 et seq.; Carter v. Carter Coal Co., 298 U. S. 238, Syll. 4, l. c. 312, et seq.; U. S. v. Reese, 92 U. S. 214, l. c. 221; Hill v. Wallace, 259 U. S. 44, l. c. 70, 71). Or where, also as in this case, in eliminating the invalid part, the Court would have to destroy a valid portion of the remainder—Employers' Liability cases, 207 U. S. 463, l. c. 500-1.

We shall attempt to demonstrate in our brief that for all of these reasons, the separability clause can not save any part of Section 12-H. We say here, however, that the question is one of great importance and should be settled by this Court, in order that the public, United States Attorneys, and Grand Juries may know what, if any, part of the act is valid, and against whom it may be enforced.

(2) The Court of Appeals Has Decided a Federal Question in a Way That Is Untenable, Against the Weight of Authority, and in Conflict With Applicable Decisions of This Court.

The trial court charged the jury as follows (R. 1187):

> "Some of the Government's evidence has related to the payment of money after February 25, 1937, to persons holding public office at the time of receipt of the money, and the defendants have contended that such payments were not in connection with the candidacies, nominations or elections of such persons, and, thus, not contributions in violation of Section 12-H. It is the Government's contention that such payments

> were in fact made in contemplation of such persons becoming candidates for office and so were in connecnection with their candidacies, nominations, or elections, and, hence, in violation of section 12-H,"

to which charge petitioner excepted as follows (R. 1195-6):

> "I desire to except to that part of the Court's charge where it charged the jury that contributions, although not given to people then candidates for public office, might be considered on the question of guilt and as constituting guilt if the jury find that they were made in contemplation of candidacy. I wish to except to that part."

The case thus presents the question as to whether or not Section 12-H can be enlarged by construction to include offenses not expressed in its terms, to wit: contributions made to persons not at the time candidates, but "in contemplation of such persons becoming candidates for office."

We shall endeavor, in our brief, to point out the error in this instruction, because it is contrary to the general rule that criminal statutes cannot be enlarged by construction to include offenses not clearly expressed in their terms—St. Louis Merchants Bridge Terminal Ry. Co. v. U. S., 188 Fed. 8th Cir. 191, Syll. 2, l. c. 193; Erbaugh v. U. S., 173 Fed. 8th Cir. 433, l. c. 435; U. S. v. Wiltberger, 5 Wheat. 76, l. c. 96; 59 C. J. Statutes, Sec. 660, pp. 1115, 1116, note 27—and that such a construction of Section 12-H conflicts with the recent decision of this Court in Viereck v. U. S., 318 U. S. 236.

There, this Court held that a statute requiring foreign agents to file a statement of their activities "as agent of a foreign principal" (l. c. 238), could not be extended by construction to require the agent to file a statement of any activity except "as agent" (l. c. 243), and held reversible error the trial court's charge that "It is sufficient if you

find that he engaged in the activities, whether on behalf of his foreign principal or principals or on his own behalf (l. c. 240)."

And said this Court (l. c. 243):

> "We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent.' The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

Section 12-H limits its prohibitions to contributions made in connection with a candidacy, and the fact that the recipient is a candidate, is an essential element of the offense. The trial court's attempt to enlarge it to include contributions made in contemplation of candidacy, presents the same error that was condemned in the Viereck case.

The Court of Appeals avoided a direct decision on this point by construing the instruction as applicable only to counts 2 to 8 of the indictment, on which petitioner was acquitted. We shall point out in our brief, as we did in our petition for rehearing (R. 1273-5), that this is a clear misconception of the record. That the instruction had no connection whatsoever with the offenses charged in counts 2 to 8, and was applicable solely to count 1 charging conspiracy. If, as the Government contends, the act is valid, either in whole or in part, this question of its construction becomes of great public importance and it should be settled by this Court.

(3) The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits, and Has Decided an Important Question of General Law in a Way That Is Untenable and in Conflict With the Weight of Authority.

If there is one principle that seems to be settled in these conspiracy cases, it is that mere knowledge, presence, acquiescence or approval of the unlawful acts of others is not enough. The Government must go farther and produce substantial evidence that, with such knowledge, the accused intentionally **participated therein.** It was so ruled in the 9th Circuit in Weniger v. U. S., 47 Fed. (2d) 692, l. c. 693; in the 2nd Circuit, in U. S. v. Potash, 118 Fed. (2d) 54, syl. 7, l. c. 57; Marrash v. U. S., 168 Fed. 225, syl. 6, l. c. 231; Lucadamo v. U. S., 280 Fed. 653, syl. 2, l. c. 657, paragraphs 2, 3; in the 7th Circuit, in Turcott v. U. S., 21 Fed. (2d) 829, and Zito v. U. S., 64 Fed. (2d) 772, syl. 5, l. c. 775, par. 5; in the 6th Circuit in Patterson v. U. S., 222 Fed. 599, syls. 28, 29, l. c. 631, pars. 28, 29; in the 5th Circuit, in Young v. U. S., 48 Fed. (2d) 26, syl. 3, l. c. 27, 1st column, last paragraph; in the 10th Circuit, in Bacon v. U. S., 127 Fed. (2d) 985, syll. 4, l. c. 987.

The Court of Appeals admits, in its opinion, that the cases above cited support the above rule (R. 1245). The Court of Appeals then proceeds to modify and restate the rule (R. 1246-7) in such a way as to omit the essential element of participation, thus making it possible to convict of crime without proof of any criminal act, and producing a conflict with the decisions of the other circuits in the cases above cited.

In view of the extensive use that is now being made of the conspiracy statute by United States Attorneys in

criminal prosecutions, it would seem to be a matter of great importance and of general public interest that this conflict, as to the essential elements necessary to convict, be settled by this Court.

(4) Several Questions of General Law Were Decided in a Way That Is Untenable and in Conflict With the Weight of Authority.

(See, supra, specifications of error to be urged, Nos. 3, 4, 5 and 6, and questions presented Nos. 5, 6, 7, and 8.)

These remaining questions are probably not of themselves of enough general importance to warrant certiorari; however, the court below decided them in a way that is untenable and against the weight of authority, and if the writ is granted we wish to argue them as additional grounds for reversal. The impelling reasons for granting the writ are, of course, the important questions of federal law stated supra as 1 (a) and (b) and 2, under reasons for granting the writ, and the conflicts of decision pointed out in 3, supra.

We submit that the above federal questions at least are all of public importance in the administration of the Act, and ought to be settled by this Court.

Prayer for Writ.

Wherefore, petitioners pray that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceed-

ings in the case numbered and entitled on its docket as No. 12,267, Louis H. Egan, Appellant, v. United States of America, Appellee; and that said judgment of the said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

THOMAS BOND,
Attorney for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

The **statement of the grounds of jurisdiction**, the **statement of the case**, and the **specification of errors**, required by Rule 27, are all set out in the foregoing petition for certiorari.

SUMMARY OF ARGUMENT AGAINST THE CONSTITUTIONALITY OF SECTION 12-H.

The language of section 12-H, including, as it does, purely intrastate practices in connection with state and substate elections, coupled with the failure of Congress to limit the application of the section to companies engaged in interstate commerce, and the failure to limit the prescribed contributions to those which affect interstate commerce, together with the absence of any declaration by Congress that such contributions affect interstate commerce, or any provision for an administrative finding that they have such effects, make it clear that the section is not a valid exercise of the commerce power.

ARGUMENT.

(1) Constitutional Questions.

The Government conceded in its brief in the court below that the validity of section 12-H does not rest upon the power to regulate federal elections or the mails or the instruments of commerce. It sought to sustain section 12-H in its entirety, solely under the commerce clause of the Constitution. It is the contention of petitioner that section 12-H is not a valid exercise of the power to regulate commerce among the several states.

At the outset, we wish to point out that section 12-H is not restricted to corporations engaged in interstate com-

merce; it includes "any registered holding company, or any subsidiary thereof," irrespective of whether or not such company or subsidiary is engaged in interstate commerce. The fact of registration does not include engagement in interstate commerce—companies whose business is wholly intrastate, or having subsidiaries whose business is wholly intrastate, may be required to register. This is demonstrated in detail by reference to and analysis of the pertinent sections of the act, in petitioner Union Electric Company's petition for rehearing below, pages 2-4 (R. 1280-2). The constitutional questions presented to this Court are not limited or qualified by the evidence in this particular case. It is the statute itself that is being tested.

The local contributions of registered holding companies or any subsidiary not engaged in interstate commerce, made wholly intrastate to local candidates, cannot affect interstate commerce because such company would not be engaged in any such commerce. If political contributions can affect interstate commerce, it can only be by reason of some supposed effect on the commerce of the company making them, and if such company does not engage in interstate commerce, then there is no such commerce to be affected.

This, in itself, is enough to invalidate section 12-H because, where the language of a criminal statute embraces acts beyond the federal power, the courts cannot limit it by construction to acts that might be within the federal power.

> James v. Bowman, 190 U. S. 127, l. c. 139-142;
> U. S. v. Reese, 92 U. S. 214, l. c. 221;
> The Employers' Liability cases, 207 U. S. 463, l. c. 496-501.

We contend further, however, that even if it were true as the court below assumed, that section 12-H applies only to corporations that are engaged in interstate commerce,

still Congress may not regulate their purely intrastate activities unless they have a close and substantial relation to interstate commerce—and we submit that no such relation here exists.

In all the recent cases where the power of Congress to deal with intrastate activities has been upheld, the statute in question has specifically limited its operation to activities having such effect.

N. L. R. B. v. Jones & Laughlin Steel Corp'n, 301 U. S. 1, l. c. 22, 23 and footnote, 24, 30, 31, 32;
Currin v. Wallace, 306 U. S. 1, l. c. 5, 9, 13;
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, l. c. 392, 393;
U. S. v. Darby, 312 U. S. 100, l. c. 109 and footnotes, 110;
U. S. v. Wrightwood Dairy Co., 315 U. S. 110, l. c. 116,

and in all of the individual cases arising in the course of the administration of the statutes held valid in the above cases, the orders of the administrative agencies or boards charged with the administration of the act, have only been upheld when the Court could find from the evidence before it that the activity in question did, in fact, substantially affect interstate commerce.

Santa Cruz Packing Co. v. N. L. R. B., 303 U. S. 453, syl. 6, l. c. 466;
N. L. R. B. v. Fainblatt, 306 U. S. 601;
A. B. Kirschbaum v. Walling, 316 U. S. 517;
Wickard v. Filburn, 317 U. S. 111, l. c. 125-9;
Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88.

Section 12-H is not limited to contributions that affect interstate commerce. The act contains no finding or declaration by Congress that the prescribed contributions have any such effect, and the act provides for no finding by any administrative agency as to the effect of any such

contributions on interstate commerce. There is, therefore, no basis for the assumption that any relationship exists between the prescribed contributions and interstate commerce.

The only suggestion contained in the opinion below, as to how such contributions might affect interstate commerce, is that they constitute "such a lack of economy in management and operation as directly to affect or burden interstate commerce" (Opinion of the Court of Appeals, R. 1237-8). It is obvious, however, that certain of the prescribed contributions cannot reasonably or rationally have any such effect, to wit, small contributions of a few dollars, large contributions made infrequently, contributions in any amount and no matter how frequent, if made by registered holding companies or their subsidiaries **not** engaged in interstate commerce.

The court below apparently recognized that trivial contributions could not reasonably affect interstate commerce, but held that the contributor was not removed from the scope of federal regulation when the sum of all such contributions may be far from trivial. Wickard v. Filburn, 317 U. S. 111, 127-8.

We submit, however, that there is no parallel whatever between this case and Wickard v. Filburn. There this Court held that, although the excess wheat grown in that particular case was trivial, it became a part of the total supply overhanging the market, and that the sum of such excess wheat produced by all growers was "far from trivial" and affected the price of wheat moving in interstate commerce.

In this case, however, there is no relation whatever between a contribution made by one corporation and a similar contribution made by another. Neither could affect the assets or the interstate business of any company, except the one making the contribution. The total of all contributions made by all registered corporations

might affect elections, but the accumulation thereof could not affect in any way the interstate business of any particular corporation.

Further, we submit that no wasteful expenditure can have any effect upon interstate commerce unless the corporation guilty of it is engaged in interstate commerce and hence, as to such companies at least (and Section 12-H includes them), there can be no possible reasonable or rational basis for assuming any relationship between the prescribed contributions and interstate commerce.

Finally, we submit that the entire conception of any close or substantial relationship between the prescribed contributions and interstate commerce is fanciful and far-fetched.

This Court has often pointed out that every activity of a corporation engaged in interstate commerce, if pursued through all its distant repercussions, may, in an ultimate sense, in some way affect interstate commerce, but these distant repercussions have never been deemed sufficient to bring the matter within the reach of the federal power.

Justice Cardozo said, in the Schechter case (295 U. S. 495, l. c. 554), "to find immediacy or directness here is to find it almost everywhere."

This Court has always maintained the distinction recognized in the Constitution itself between what is national and what is local. N. L. R. B. v. Jones & Laughlin Steel Corp'n, 301 U. S. 1, l. c. 29, 30, 37.

We therefore submit that section 12-H, in its entirety, is clearly beyond the power of Congress under the Commerce Clause of the Constitution.

We have heretofore pointed out in the petition, supra, the importance of this question and the reasons why it should be settled by this Court. To what we have said, we add, only by way of further argument, that in the Electric Bond & Share case, 303 U. S. 419, l. c. 435, this Court held specifically that the decision in that case was without

prejudice to the future challenge of the validity of any provision of the act or requirement of the Commission outside of sections 4 (a) and 5. This suit is such a challenge, and we respectfully submit that it presents a question that should be settled by this Court.

(2) **Separability.**

Section 12-H cannot be saved by striking out the words "or otherwise," because these words apply to contributions to candidacies "for or to any office or position in the Government of the United States," the regulation of which is within the federal power (U. S. v. Classic, 313 U. S. 299). The doctrine of separability does not permit cutting down a valid provision in order to save an invalid one—see the Employers' Liability Cases, 207 U. S. 463, l. c. 501, where this Court said to do so would be "to destroy in order to save and to save in order to destroy."

The only remaining possibility is to strike the words "a state or any political subdivision of a state" from paragraph 1 of section 12-H, and to rewrite paragraph 2 thereof so as to limit its application to contributions made to parties or committees for use in federal elections. Where the provisions of a statute are thus "interwoven," separability is impossible (Electric Bond & Share Co. v. SEC, 303 U. S. 419, l. c. 434-5). Nor can a statute be thus rewritten—Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, l. c. 362. Nor can the Court "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain"—Hill v. Wallace, 259 U. S. 44, l. c. 70, and U. S. v. Reese, 92 U. S. 214, l. c. 221. Further, as said by this Court in Williams v. Standard Oil Co., 278 U. S. 235, a separability clause "is an aid merely; not an inexorable command," l. c. 241, and the test of its application is whether or not there is a "clear probability that, the invalid part being eliminated, the Legislature would not have been satisfied with what

remained," l. c. 242. There is such a clear probability here. If rewritten and restricted to federal elections, there would be no need for section 12-H. The same field is covered more comprehensively in the Federal Corrupt Practices Act of 1925, 2 U. S. C. A., Sec. 251, 43 Stats. 1074.

The obvious purpose of section 12-H is to prohibit registered holding companies or their subsidiaries, or anyone on their behalf, from making any contribution to any candidate or to any election and thereby take them completely out of politics.

This purpose would not be accomplished by merely reenacting, in different form, the section of the Federal Corrupt Practices Act, 2 U. S. C. A., Sec. 251, which now makes it

> "* * * unlawful * * * for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a senator or a representative in, or a delegate or resident commissioner to, Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

Fines are imposed against any corporation violating this section, and fine and imprisonment are imposed upon any officer and director consenting. It would thus seem that there is at least a clear probability that Congress would not have been satisfied with section 12-H if rewritten and limited merely to federal elections. We say, therefore, that the separability clause cannot save any part of section 12-H.

This is the first case in which section 12-H has been attempted to be enforced by criminal action; it is, therefore, the first time that its validity and construction have been challenged. The section involves a novel exercise of federal power. It more directly affects the general public than any other section in the act. The questions raised

have not been decided by this Court. They are of great importance, and the decision thereof of great public interest. We respectfully submit that they should be heard and decided by this Court.

(3) Construction of Section 12-H.

In plain and unambiguous terms, section 12-H is limited to contributions made in connection with the "candidacy" of any person for any office or position. The fact that the recipient of the contribution be a candidate is an essential element of the offense. It does not include contributions made in contemplation of the recipient becoming a candidate—he may change his mind and never file or seek the office, in which case no offense could have been committed; yet the trial court, against petitioner's exception, charged the jury that payments made to persons not candidates could be considered on the question of guilt if made in contemplation of such persons becoming candidates for office (see charge quoted supra in petition, and R. 1187), and the Court of Appeals disallowed petitioner's assignment of error based on this charge (R. 1258).

The rule strictissimi juris applies to the construction of criminal statutes, and they cannot be enlarged by implication or intendment to include offenses not clearly expressed in their terms (59 C. J., Statutes, Sec. 660, pages 1115-6 and note 27). Federal cases so holding are cited supra in our petition.

Even were section 12-H ambiguous—which it is not—the ambiguity would not be resolved so as to create an offense not clearly expressed in its terms.

U. S. v. Zenith Radio Corp'n, 12 Fed. (2d) 614, syl. 2, l. c. 617;
Krichman v. U. S., 256 U. S. 363, l. c. 367-8.

In the Viereck case (318 U. S. 236, l. c. 243-4) this Court said:

> "While Congress undoubtedly had the general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose."

So, here, to the words "any contribution whatsoever in connection with the candidacy * * * of any person" there cannot be interpolated the words "or in contemplation of candidacy." We submit that the opinion in the Viereck case directly sustains petitioner on this point.

The opinion below, in dealing with this point (R. 1257-8), omitted to quote the part of the charge that misconstrued the statute, and to which our exception was specifically directed. It quoted only the paragraph following (R. 1187). It is necessary that this omitted part be considered, and we have quoted it above in our petition. It is in this omitted part that the Court put the proposition to the jury that payments made in contemplation of candidacy could be considered in violation of section 12-H (R. 1187). The opinion, having thus failed to disclose the point, also avoided deciding it, as follows (R. 1258):

> "We fail to see how this instruction concerns Egan's appeal. The instruction is applicable to the substantive offenses charged in Counts 2 to 8, inclusive, and not to the conspiracy charge. There was abundant evidence of overt acts under the conspiracy charge of contributions to candidates for various offices, federal and nonfederal, and to political parties and committees. Since Egan was not convicted upon the substantive counts of the indictment, he cannot complain on appeal of the instructions relating to these counts."

This is an absolute misconception of the record. The indictment shows that this part of the Court's charge had no reference whatever to counts 2 to 8 (R. 23-31). These counts charged contributions to named candidates then, in fact, running for office, and made during their campaigns —see testimony of candidates named in these counts (R. 615, 614, 613, 609, 607, 611 and 616). On the other hand, the evidence referred to in the Court's charge was the mass of evidence admitted over petitioner's objection (R. 408, 409, 411, 412), tending to prove that commissions on company insurance were split with brokers who were also State Senators and City Aldermen, and who were not at the time candidates for any public office (R. 406-9, incl., 587-97, incl.). This evidence was coupled with other evidence to prove that petitioner knew of these insurance practices—see Spoehrer's affidavit, Government Exhibit No. 70 (R. 76, 77, 441-3, 821-7). It was all offered solely on the conspiracy count, the purpose being to prove that the payments in question were overt acts in furtherance of the conspiracy and that petitioner knew all about it. It was part of the chain of evidence by which it was sought to connect petitioner with the conspiracy.

Petitioner objected to the evidence and excepted to the charge. He was convicted on the conspiracy count and has a right to complain both of the reception of this incompetent and prejudicial testimony, and the misdirection by the Court as to its legal effect.

We submit that if any part of section 12-H can be held valid, this matter of its proper construction becomes an important question of federal law that should be settled by this Court.

A similar question of statutory construction was deemed sufficiently important to warrant certiorari in the Viereck case (318 U. S. 236).

The charge was also erroneous because not supported by any evidence. The Government offered no proof whatever

that the payments to the insurance broker office holders were either in contemplation of a candidacy or in any way connected with a candidacy.

(4) The Test of Criminal Liability Applied by the Court of Appeals Conflicts With the Decisions in Other Circuits and Is Against the Weight of Authority.

After conceding that the decisions in other circuits, some of which the court below cites, sustain the rule that (R. 1245),

> "Mere knowledge, presence, acquiescence or approval of the unlawful acts of others is not enough; that proof of intentional participation must also be shown,"

the opinion then goes on to hold (R. 1246-7):

> "If the accused has a legal responsibility in the premises, if he has some interest in the success of the conspirators in the accomplishment of their design, if the conspirators informed him of their plan and keep him advised of the steps taken by them to attain their purpose, and he by his approval stimulates their activities, if he also knows that such activities are illegal, and if such activities are so numerous as to constitute a course of business, or are so related as to constitute a system of unlawful conduct continuing over a long period of time, then the jury upon evidence of such facts would be warranted in finding him guilty."

It thus omits the essential element of participation and, in lieu thereof, it includes, in addition to knowledge and approval, the following: (a) Legal responsibility; (b) interest, and (c) that the activities cover a long period of time and constitute either a course of business or a system of unlawful conduct.

We deny that the presence of these elements either constitutes proof of participation or supplies the lack of such

proof. No authority can be found for such a modification of the rule. It conflicts with the law as declared in the Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits in the decisions cited supra in our petition under "Reasons for Granting the Writ (3)."

One or more of these elements, (a), (b) and (c), supra, were present in most of the cases cited from the above Circuits, yet proof of intentional participation was, nevertheless, held essential.

In the Weniger case, 47 Fed. (2d) 692, a sheriff, under state law, had a legal responsibility in the premises (l. c. 692, first col., last par.); he also had an interest in the success of the conspiracy, to wit, the political support of the conspirators (l. c. 693, second col., third par.) and the law violations were numerous and constituted a course of business, all with the Sheriff's approval.

In the Potash case (118 Fed. [2d] 54), the defendant, Kochinsky, had an interest in the success of the conspiracy to influence witnesses, as he was a defendant in the anti-trust case (l. c. 55).

In the Marrash case (168 Fed. 225), the defendants had both knowledge and an interest in that "the merchandise was imported for their benefit" (l. c. 231).

In the Patterson case (222 Fed. 599), knowledge and acquiescence by a corporate officer of a criminal course of conduct carried on by other officers was held insufficient to convict.

In the Young case (48 Fed. [2d] 26), and in the Bacon case (127 Fed. [2d] 985), and in the Zito case (64 Fed. [2d] 772), the activities were numerous and constituted a course of conduct.

These illustrations could be multiplied. They demonstrate that the special facts postulated in the opinion of the Court of Appeals do not modify the rule. To so modify it would permit a defendant to be convicted of crime without proof of any criminal act. That the Court

of Appeals rule is unsound appears from the reasoning in the above and the other cases cited in our petition herein.

We contend, further, that there is no substantial evidence in this record to prove the elements postulated in the Court of Appeal's opinion as being sufficient to convict. We pointed this out to the Court of Appeals in our petition for rehearing (R. 1263-5). It would unduly lengthen this brief to argue the point here, but we expect to brief it fully if certiorari is granted. We deem it sufficient, at this time, to point out that the Court of Appeals has applied a novel test of criminal liability in conspiracy cases that is in conflict with the law as declared in at least six other circuits, and is against the weight of authority.

We submit that, in the interest of uniformity, this conflict should be settled by this Court.

CONCLUSION.

Because of the importance of the federal questions presented, and for the other reasons set out in our petition and brief herein, we submit the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS BOND,
Attorney for Petitioner.

October 2, 1943.

(24)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 414

UNION ELECTRIC COMPANY OF MISSOURI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit.

WILLIAM L. IGOE,
ROBERT J. KEEFE,
Attorneys for Petitioner.

October, 1943.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Cases Cited.

Statutes Cited.

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UNION ELECTRIC COMPANY OF MISSOURI,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner, Union Electric Company of Missouri, a corporation, prays that a writ of certiorari be issued to review the judgment (R. 1259) of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on August 9, 1943, in a cause entitled "Union Electric Company of Missouri, Appellant, *versus* United States of America, Appellee", designated in that Court as No. 12,268, Criminal.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, upon which its judgment was based, has not yet been reported but is set out in the record (R. 1231).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. § 347 (a)), subject to the rules promulgated by this Court on May 7, 1934, pursuant to the provisions of the Act of February 24, 1933, c. 119, as amended by the Act of March 8, 1934, c. 49, 48 Stat. 399 (18 U. S. C. 688).

The judgment of which review is sought was entered on August 9, 1943 (R. 1259) but did not become final until September 9, 1943, when petitioner's (appellant's) petition for rehearing was denied (R. 1295).

STATUTE INVOLVED

The statute involved is Title I of the Public Utility Act of 1935, entitled "An Act to Provide for Control and Regulation of Public Utility Holding Companies, and For Other Purposes", 49 Stat. 803 (15 U. S. C. § 79), hereinafter referred to as the Act.

Petitioner was convicted of conspiracy (Section 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88) to violate Section 12 (h) of the Act (15 U. S. C. § 79L (h)) and of seven violations of that Section, which is as follows:

> "(h) It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—
>
> (1) to make any contribution whatsoever in connection with the candidacy, nomination, election

or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

"The term 'contribution' as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution."

QUESTIONS PRESENTED

(1) Are the provisions of Section 12 (h) of the Act, prohibiting contributions, made otherwise than by use of the mails or any means or instrumentality of interstate commerce, in connection with a non-federal candidacy or to a political party or committee not engaged in promoting a federal candidacy, within the power of Congress, under Article I, Section 8, Clause 3 of the Constitution, to regulate commerce among the several states?

(2) If Section 12 (h) of the Act is constitutionally invalid as it stands, may any part of it be sustained as valid and separable from the remainder?

(3) Is the test, applied by the District Court and approved by the Circuit Court of Appeals, of petitioner's responsibility for the acts of certain of its officers in making the contributions in question erroneous as in conflict

(a) with applicable local decisions?

(b) with applicable decisions of this court?

STATEMENT

Petitioner is a corporation organized under the laws of Missouri (R. 234, 235, 238). It is engaged as a public utility corporation in the business of producing and distributing electricity in that State, and it owns the stock of subsidiary companies engaged in similar public utility operations in the State of Illinois and in a small part of the State of Iowa, as well as in areas in Missouri not directly served by petitioner (R. 950). It is engaged in interstate commerce, since it transmits electricity to Illinois and receives electricity from that State (R. 223, 224). It is a subsidiary company, as defined in Section 2 (a) (8) of the Act (15 U. S. C. § 79b (a) (8)), of The North American Company, a corporation of New Jersey, which is a "registered holding company" under Section 5 (a) of the Act (15 U. S. C. § 79e (a)).

The indictment in this case charges petitioner and its former president, Louis H. Egan, with participation in a criminal conspiracy to violate Section 12 (h) of the Act and, in separate counts, with seven violations of the provisions of that section (R. 16-31). The conspiracy described in the first count is a conspiracy to make, on behalf of petitioner and by use of the mails, means and instrumentalities of interstate commerce, and otherwise, contributions in connection with candidacies for both Federal and state offices and positions (R. 18-19). Each of the second to seventh counts, inclusive, charges the making, by use of the mails, of a contribution in connection with a candidacy for an office in Missouri (R. 23-30); and the eighth count charges the making, by use of an instrumentality of interstate commerce, of a contribution in connection with a candidacy for an office in the State of Illinois (R. 30-31).

After trial petitioner was found guilty by a jury upon each of the eight counts (R. 52-53) and judgment was rendered accordingly (R. 57-58). Its co-defendant, Egan, was

convicted only of the conspiracy charged in the first count of the indictment (R. 53).

Petitioner's appeal to the United States Circuit Court of Appeals for the Eighth Circuit was taken and prosecuted separately from the appeal of its co-defendant, Egan, but the appeals were presented on a joint record and were decided in one opinion (R. 1231) upon which separate judgments of affirmance were entered (R. 1259).

In the District Court petitioner demurred to the indictment, asserting that Section 12 (h) of the Act was constitutionally invalid upon the ground, among others, that it exceeded the powers of Congress and encroached upon the powers reserved to the states, in violation of Art. I of the Constitution and of the Tenth Amendment (R. 203). The constitutional objections, which the District Court overruled, were repeated in an objection to the taking of evidence (R. 212), in a motion for directed verdict (R. 922), and in motions after verdict (R. 1206, 1218). The adverse rulings of the District Court upon these objections were assigned as error upon the appeal (R. 168, 170, 171, 198).

The Circuit Court of Appeals held Section 12 (h) of the Act to be entirely valid as an exercise by the Congress of its power to regulate interstate commerce (R. 1234-1239). Therefore, it found it unnecessary to deal with petitioner's contention that no part of the Section might be sustained as separable from the remainder (R. 1234).

In addition to the questions raised by petitioner's constitutional objections to the statute are those which were presented below with reference to the test of petitioner's responsibility, as a corporation, for the acts of certain of its officers in making the political contributions in question.

The funds out of which those contributions were made had been obtained from petitioner upon false expense accounts and from persons who had obtained money from petitioner in payment of false bills (R. 511). The scheme

under which all of this was done was carried out under the direction of petitioner's executive vice-president, who received all of the funds except minor amounts; and the contributions from these funds were made either by him or by a subordinate officer at his direction (R. 895).

The evidence showed that the control and management of petitioner's business and property was in its Board of Directors, as provided in its by-laws (Art. II, Sec. 1—R. 928) and in the statutes of the State of Missouri,[1] in which petitioner was incorporated (R. 234, 235, 238), and that its officers had "such powers and duties as generally pertain to their respective offices, as well as such powers and duties as from time to time may be conferred by the Board of Directors or the Executive Committee" (By-laws, Art. III, Sec. 3—R. 930).

There was no evidence in the case that the Board of Directors or the Executive Committee had conferred upon any officer authority to make a political contribution.

The corporate charter of petitioner (R. 226-239) defines its powers and purposes (R. 229-233, 235-237). These do not include political activity of any sort; and a statute of the State of Missouri makes it unlawful for any corporation organized in that State to make a political contribution or, by any means, to attempt to influence the result of an election.[2]

In both of the courts below petitioner contended that the test of its responsibility for the acts of certain of its officers, in making, or conspiring to make, the contributions shown by the evidence, was whether those acts had been authorized, expressly or impliedly, by its Board of Directors. And it asserted that since there was no evidence that such acts had been expressly authorized by that Board, the minimum requirement was proof that a majority of its members, having prior actual knowledge of the fact that such acts were in contemplation, failed to object thereto.

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1 R. S. Mo., 1939, Section 5346, which was Section 4941 of R. S. Mo., 1929.
2 R. S. Mo., 1939, Section 11786 (R. S. Mo., 1929, Section 10478).

The trial court's charge to the jury upon this phase of the case is quoted in the opinion of the Circuit Court of Appeals (R. 1247-1248). The test of corporate responsibility which the trial court applied and the Circuit Court of Appeals approved is evidenced also by the refusal of petitioner's requested instructions numbered 3 (R. 1176), 3-A (R. 1177), 4-A (R. 1177), 5 (R. 1177-1178), and 6 (R. 1178).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that Section 12 (h) of the Act is valid as within the power of the Congress to regulate commerce among the several states;

(2) In holding that the trial court did not err in that portion of its charge to the jury quoted in petitioner's assignment of error numbered XXII (R. 194);

(3) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 4-A (R. 1177), quoted in petitioner's assignment of error numbered XIX (R. 192);

(4) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 5 (R. 1177), quoted in petitioner's assignment of error numbered XX (R. 192);

(5) In holding that the trial court did not err in refusing to charge the jury as stated in requested instruction numbered 6 (R. 1178), quoted in petitioner's assignment of error numbered XXI (R. 193);

(6) In holding that the trial court did not err in overruling petitioner's motion for a directed verdict in its favor (R. 919, 923, 1166), referred to in petitioner's assignment of error numbered IV (R. 171).

REASONS FOR GRANTING THE WRIT

(1) *The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.*

The primary question in this case is whether or not Section 12 (h) of the Act (28 U. S. C. § 79L (h)) is within the power of Congress to regulate interstate commerce. That section has not been passed upon by this Court. The Act of which it is a part is of major importance in recent Federal legislation. This Court has had occasion to deal with cases involving other parts of it.

In *Electric Bond and Share Company, et al. v. Securities and Exchange Commission, et al.*, 303 U. S. 419, the question was presented whether Sections 4 (a) and 5 of the Act, requiring registration as a condition of the right to engage in any of the activities there enumerated, were enforceable against the petitioners in that case, who asserted that the entire Act was unconstitutional. This Court held that Sections 4 (a) and 5 were valid and separable from other sections of the Act, so that they might be enforced independently of the provisions of other sections. In stating that conclusion the Court said:

> "It is evident that the provisions of §§ 4 (a) and 5 are not so interwoven with the other provisions of the Act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter."
>
> (pp. 434-435, of 303 U. S.)

In *The North American Company v. Securities and Exchange Commission* (No. 721, October Term, 1942), now before this Court upon writ of certiorari, questions are involved as to the constitutionality of Section 11b (1) of the Act.

The questions as to the constitutionality of Section 12 (h) are apparent upon the face of it. It prohibits contributions in connection with state, as well as Federal, candidacies. It prohibits contributions to political parties or committees, without differentiation between parties or committees engaged in promoting Federal candidacies and those not so engaged. And its prohibitions apply to contributions made by use of the mails or any instrumentality of interstate commerce *or otherwise.*

By the terms of Section 12 (h), those prohibitions apply to every registered holding company and to every subsidiary company. In view of the definitions of those terms in Section 2 of the Act (15 U. S. C. § 79b), of the provisions for exemption in Sections 2 (a) and 3 (a) (15 U. S. C. § 79b, 79c), and of the kinds of activity requiring registration, as enumerated in Section 4 (15 U. S. C. § 79d), a company may be within the class to which Section 12 (h) is applicable although it engages in no interstate commerce.

The Congressional findings upon which the legislation was enacted and the broad purposes of it are stated in Section 1 of the Act. There is no mention in that Section of political contributions.

In view of all of these factors, it is submitted that the constitutional questions apparent upon the face of the statute are serious ones which should be settled by this Court.

(2) *The decision of the Court below is inconsistent with principles established by decisions of this Court.*

The conclusion reached by the Circuit Court of Appeals and certain of the premises upon which it is based do not give effect to the rule that intrastate activity is not within the reach of the Federal power unless it has a substantial effect upon interstate commerce or upon the regulation of such commerce.

United States v. Wrightwood Dairy Co., 315 U. S. 110

United States v. Darby, 312 U. S. 100

In such a case the question is whether "the particular activity" involved has such an effect (*U. S. v. Darby,* 312 U. S., at pp. 120-121).

The statute in question here applies to all registered holding companies and their subsidiaries, whether or not engaged in any interstate commerce; and it prohibits all contributions of the defined class, regardless of size. A contribution of $5 by a company with operating expenses of several millions of dollars per year is within the prohibition of the statute. The Circuit Court of Appeals disposed of that point upon the ground that, although the statute prohibits even trivial contributions, the sum of all such contributions may be far from trivial, citing in connection with that conclusion the decision of this Court in *Wickard v. Filburn,* 317 U. S. 111, 127-8.

The basis of the decision in that case was in the fact that wheat grown by different individuals becomes a part of the total supply overhanging the market and thereby affects the price of wheat moving in interstate commerce. But there is no comparable relationship between a political contribution made by one company and similar contributions made by other companies. The theory of the opinion of the Circuit Court of Appeals as to effect upon interstate commerce seems to be based upon the proposition that such contributions constitute lack of economy—that they are wasteful of the contributing company's assets (R. 1237-1238). If that be assumed, no relationship is demonstrated between contributions made by different companies. The assets of one company will not be affected by a contribution made by another. Moreover, a wasteful contribution by a particular company will not affect interstate commerce if that company does not engage in such commerce.

It is said in the opinion of the Circuit Court of Appeals:

> "If such contributions are considered as costs of operation, or if they are disguised upon the books of the

utility company as operating costs, they will affect rates."

(R. 1236)

Clearly political contributions may not be considered costs of operation. The fact that they may be disguised on the books of the Company as operating costs does not, it is submitted, show any legislative power to prohibit the contributions themselves. Any expenditure may be falsely entered on the books as an operating cost and, if the fraud be undetected, will have an effect on rates. If Congress had the power upon that ground to prohibit the expenditures themselves, its control over intrastate activities of utility companies incorporated in the several states would be practically without limit.

Again, if a contribution, regardless of size, might have an effect upon the rates at which electricity is sold, that fact would not demonstrate the necessary relationship to interstate commerce unless the statutory prohibition were confined to companies engaged in such commerce.

The opinion cites the fact that petitioner is engaged in interstate commerce and therefore subject to the control of Congress (R. 1237). That fact, however, is immaterial. What is being tested is the statute itself (*James v. Bowman*, 190 U. S. 127, *United States v. Reese*, 92 U. S. 214), and it is not confined to companies engaged in interstate commerce. If it were so confined, the contributions which it prohibits would not thereby be shown to be within the reach of the Federal power. The power of the Congress would not extend to intrastate activity of such companies, unless there were reasonable basis for the conclusion that the activity in question substantially affected the interstate commerce with which the Congress has power to deal.

It is submitted that the decision of the Circuit Court of Appeals is not consistent with these limitations, as settled by decisions of this Court.

(3) *The test of petitioner's responsibility for the acts of certain of its officers in making the contributions, as applied by the District Court and approved by the Circuit Court of Appeals, is erroneous.*

The question was whether or not petitioner's officers who made the contributions in question acted within the scope of their authority.

If, as petitioner contended below, the question whether its officers had the required authority to make the contributions is determinable by the local law, the trial court's charge to the jury was erroneous because in conflict with applicable local decisions. If the matter involved presents a federal question the charge was erroneous because in conflict with applicable decisions of this Court.

The test of agency under Missouri law.

1) As pointed out in the Statement, under the by-laws of the corporation its officers had "such powers and duties as generally pertain to their respective offices, as well as such powers and duties as from time to time may be conferred by the Board of Directors or the Executive Committee" (Art. III, Section 3—R. 930); and there was no evidence in the case that the Board of Directors or the Executive Committee had authorized any officer of the corporation to make a political contribution.

2) The corporate charter of petitioner, defining its corporate powers and purposes (R. 229-233, 235-237), does not authorize political contributions or political activity of any sort; and under an applicable statute of the State of Missouri it is unlawful for any corporation incorporated in that state to make such contributions (R. S. Missouri, **1939**, § 11786, R. S. Missouri, **1929**, § 10478).

The general authority of an officer does not extend to a subject matter outside the business of the corporation and in excess of its corporate powers.

National City Bank of St. Louis v. Carleton Dry Goods Co., 334 Mo. 339, 67 S. W. (2d) 69, 73.

The control and management of petitioner's business and property were vested in its Board of Directors, as provided in its by-laws (Art. II, Sec. 1—R. 928) and in the Missouri statute (R. S. Missouri, **1939**, § 5346, R. S. Missouri, **1929**, § 4941). Under Missouri decisions the act of an officer of a corporation beyond his office is not the act of the corporation unless it has been expressly or impliedly authorized by the Board of Directors; and such authorization may not be implied unless at least a majority of the Board had prior actual knowledge of the proposed ultra vires act and failed to object to it.

Grafeman Dairy Co. v. Northwestern Bank, 315 Mo. 849, 288 S. W. 359;
Grafeman Dairy Co. v. Northwestern Bank, 290 Mo. 311, 235 S. W. 435 at p. 441;
Hyde v. Larkin, 35 Mo. App. 365.

The trial court refused petitioner's requests to instruct the jury to that effect (R. 1177—requested instructions numbered 4-A and 5).

The charge it gave, as set out in the opinion of the Circuit Court of Appeals (R. 1247-1248), required the jury to find petitioner guilty if the persons who made the contributions were acting "as officers" (without definition of the authority of officers or requirement of actual authorization), although the acts in question were beyond corporate powers (R. 1248).

The test of agency under decisions of this Court

The opinion of the Circuit Court of Appeals cites the following decisions of this Court:

> *Washington Gas Light Co. v. Lansden,* 172 U. S. 534;
> *New York Central & H. R. R. v. United States,* 212 U. S. 481.

In each of those cases the test stated is whether or not the *subject matter* of the act in question is within the scope of the authority of the officer or employee. In the Washington Gas Light Company case it was held that the corporation was not responsible for the action of its officer in criticizing testimony, given before a Congressional Committee, as to the cost of producing gas, because the subject matter of his act was not within the scope of his duties. In the New York Central & H. R. R. case a corporation was held liable for the act of its officer in favoring certain shippers by a rate which was less than the published rate, in violation of a federal statute. This was upon the ground that "the subject matter of making and fixing rates was within the scope of the authority and employment of the agents of the company" (212 U. S. 481 at p. 494).

In this case the making of political contributions constitutes the subject matter of the acts in question. Officers of petitioner had no authority, merely by virtue of their offices, to make such contributions, because that kind of an act was beyond the corporation's powers under its charter and the local statute. Unless they acted upon the express or implied authorization of the Board of Directors, which was vested with the "control and management" of the business and property of the corporation, they were not acting by authority of the corporation.

The test applied by the trial court and approved by the Circuit Court of Appeals, as expressed in the instruction

which is set out in the opinion (R. 1247-1248), is inconsistent with the decisions of this Court in the two cases cited, as well as with Missouri law.

CONCLUSION

In view of the important federal question presented and of the other questions referred to the case is an appropriate one for review by this Court.

Respectfully submitted,

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Attorneys for Petitioner.

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CITATIONS

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LOUIS H. EGAN, PETITIONER

v.

UNITED STATES OF AMERICA

UNION ELECTRIC COMPANY OF MISSOURI,
A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT[1]

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1231–1258) is reported at 137 F. (2d) 369.

[1] Although two separate petitions for certiorari were filed, they arise out of a single trial and are based on a single record. The most important issue raised in both petitions is the same. For this reason, we submit one brief in response to both petitions.

JURISDICTION

The judgment of the circuit court of appeals in each case (R. 1259–1260) was entered August 9, 1943, and petitions for rehearing were denied September 9, 1943 (R. 1278, 1295). The petition of Louis H. Egan for a writ of certiorari was filed October 5, 1943. The petition of the Union Electric Company of Missouri was filed October 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79y). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTE INVOLVED

Section 12 (h) of the Public Utility Holding Company Act of August 26, 1935, c. 687, 49 Stat. 803, 824–825, 15 U. S. C. 79*l* (h), provides:

> It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—
>
> (1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any

agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution.

QUESTIONS PRESENTED

1. Whether Section 12 (h) of the Public Utility Holding Company Act of 1935 is constitutional.

2. Whether petitioner Union Electric Company of Missouri is liable for the acts of its officers in making political contributions in violation of 12 (h).

3. Whether there was sufficient evidence to support petitioner Egan's conviction for conspiracy.

4. Whether the trial court committed reversible error in charging the jury that contributions made to office holders were in violation of Section 12 (h) if the jury should find that such contributions were made in contemplation of their candidacies.

STATEMENT

Union Electric Company of Missouri and Louis H. Egan, its former president, were indicted in eight counts in the District Court of the United States for the Eastern District of Missouri.

Count 1 charged a continuing conspiracy from February 25, 1937, to the return date of the indictment, among the corporation, Egan, Boehm and Laun (two officers who were not indicted), and other persons unknown to the grand jury to violate Section 12 (h) of the Public Utility Holding Company Act of 1935 by raising a secret cash fund and making political contributions therefrom (R. 16–23). Counts 2 to 8 charged separate substantive violations of section 12 (h), effected by the use of the mails or the instrumentalities of interstate commerce (R. 23–31). Demurrers to the indictment, in which petitioners challenged the constitutionality of Section 12 (h) were overruled (R. 32–33, 200–204). Egan was found guilty on the first count and Union Electric on all counts (R. 53, 1198–1199). Motions for a new trial and in arrest of judgment were denied (R. 54–56, 1200–1219). Egan was sentenced to a term of two years and to pay a fine of $10,000, and Union Electric was sentenced to pay a fine of $10,000 on each count (R. 56–58, 1220). On appeal the convictions were unanimously affirmed (R. 1260).

Union Electric is both an operating electric utility company and a holding company with subsidiaries in Missouri, Illinois, and Iowa (R. 220–224, 240–242; 686–687). It is itself a subsidiary of the North American Company, which during the entire period covered by the indictment owned, directly or indirectly, all of its com-

mon stock and possessed not less than 89.13% of the voting power (R. 251). On February 25, 1937, North American registered with the Securities and Exchange Commission pursuant to Section 5 of the Act (R. 211–212, 213–215), thus becoming a "registered holding company" as defined by Section 2 (a) (12) and subjecting itself and all its subsidiaries to Section 12 (h). Union Electric itself registered as a holding company on August 30, 1939 (R. 220). During the major part of the period covered by the indictment, until May 18, 1939, Egan was president of the company and chairman of the board of directors, Boehm was executive vice-president and member of the board of directors, and Laun was vice-president in charge of real estate and taxes (R. 215–216, 513–515, 1083).

The general program of political activity, of which the specific charges set forth in the indictment were a part, commenced in about the year 1931 under the immediate direction of Boehm, the executive vice president (R. 842). Boehm testified that Union's participation in political affairs was suggested as early as 1926 and was subsequently encouraged by officers of the parent North American, who wished to develop a political atmosphere favorable to the utility interests (R. 841–843, 857–858). The program was financed largely by a secret cash "slush fund" which was concealed on the books of the corpora-

tion (R. 309, 312, 369, 380, 448, 512, 719–720). The fund was created and concealed: (a) by kick-backs from various attorneys—Fowler, Hamilton, Alschuler, and McMillan—who returned in cash all or part of their annual retainers (R. 310–311, 315–317, 351, 648; 352–354, 364, 370–372, 648–649, 854–855); (b) by cash rebates from a contracting firm which supplied petitioner with insulators and poles (R. 260–264, 267–269, 272–276, 304, 309, 844); (c) by the return in cash of a $6,000 fee paid for an insurance survey and by the receipt in cash of insurance credits to which the Company was entitled by reason of favorable risk experience credit, long-term and fleet contracts (R. 400–403, 405–407, 413–417, 423–424, 445, 448–449); and (d) by cash returns from officers and employees who submitted inflated expense accounts (R. 459, 462, 467, 469–471, 480–481, 489–492, 495–496, 505, 620, 623–624, 646–647, 857). Boehm, executive vice president and director (R. 841, 857), Laun, vice president (R. 646–647), Spoehrer, secretary and director (R. 423, 480), Irish, research engineer and after 1938 controller (R. 495, 505), Miltenberger, vice president in charge of operations (R. 462–463), Kropp, assistant secretary (R. 444, 467), Welsh, vice president of a subsidiary (R. 619–620), May, vice president of a subsidiary (R. 623–624), Emberson, operating auditor (R. 468–469), and Avery, general auditor (R. 459),

all admitted their participation in the practice of "padding" their expense accounts. In the period from 1930 to 1939, the cash received from all these sources amounted to more than $591,000 (R. 511). All these funds, with minor exceptions, were turned over to Boehm, and disbursements therefrom were made for the most part by Boehm or by Laun at Boehm's direction (R. 264, 304, 316, 352–353, 648, 650, 859, 895).[2]

In the period from 1932 to 1939, contributions varying in amount from $25 to $4,000 were made to candidates for virtually every type of elective office, state or local, in the State of Missouri, in all elections, primary, general, or special, in all parts of the State (e. g., R. 650–654, 661–668).[3] The contributions were made to Republicans, Democrats, and nonpartisans (e. g., R. 528, 543–544, 561, 563–564, 572–573, 575, 581–582, 627–628, 632–634, 643), sometimes to opposing candidates for the same office (R. 570, 572, 622–623, 651, 662, 665–666). A number of the contributions were made to candidates for local offices who would be

[2] A few contributions from the fund were made by officials other than Boehm or Laun (R. 441, 625–628, 631–632, 619–621). In addition, Union's insurance brokers were directed to send to public officeholders who held insurance brokerage licenses "brokerage fees" for which no insurance services were rendered in return (R. 406–408, 410–411, 449–450, 563, 575–576, 582–584, 587–606).

[3] The evidence also shows contributions to candidates for offices in Iowa and Illinois (R. 548–549, 560–561, 620–623, 661–662).

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in a position to pass on the valuation of Union's property for tax purposes (e. g., R. 551, 607–609, 635–636, 643–644, 651, 659–660, 662–663). The money was frequently delivered by Laun or Boehm personally (R. 551–566, 665–666), but a number of contributions were made by registered mail (R. 530–531, 543, 554, 607–616, 658, 667, 833–840). The specific contributions set forth in counts two to eight of the indictment were proved to have been made by mail or through interstate instrumentalities (R. 607–617, 667, 670, 833–835).

In addition to these extensive contributions to candidates, petitioner's officers engaged in open and secret lobbying activities (R. 649–650, 660, 665, 668, 764–765, 844, 846, 853, 1125). Bills which were considered detrimental to the company's interests were defeated (R. 645, 655, 764–765, 845–846, 896–897). Measures which the company favored, including a bill drawn by Sullivan and Cromwell, North American's New York attorneys, were introduced and passed (R. 679–680, 842, 845, 879, 897–898). Strenuous efforts were made to defeat any proposal which would permit or encourage municipal ownership (R. 625–628, 631–632, 635–639, 655, 674, 845–846, 896–897). Laun and Boehm both testified that no bill considered detrimental to the company's interest passed the Missouri legislature (R. 645, 846).

In 1938 Funk, a former controller who had been discharged (R. 901, 1142), gave a statement to

the Securities and Exchange Commission (R. 879) which resulted in the Commission's orders for an investigation (R. 1144–1151). Numerous officers and employees of petitioner testified falsely under oath before the Commission over a period of more than a year.[4] (R. 471–472, 491, 505, 629, 685, 697–698, 902–903.) At the suggestion of Sullivan and Cromwell, two New York attorneys, Lincoln and Lundgren, were retained to defend the company during the course of the investigation (R. 348–349, 882–883, 984, 1069, 1120). They examined persons who had been called or probably would be called to testify before the Securities and Exchange Commission and discussed their testimony with some of them (R. 317–318, 322–323, 334–336, 354, 503, 630, 640, 681, 684–685). In the course of the investigation, Lincoln and Lundgren were informed of the nature of the political contributions and the source of funds (R. 322–323, 328, 354, 630, 681, 682, 883) and reported to officers of North American that the situation was serious (R. 984, 1052, 1062, 1080, 1152–1153). By May 1939 the officers of North American deemed it advisable

[4] Laun, Boehm, and an employee named Martin were all indicted for perjury as a result of their testimony before the Commission (R. 629, 685, 890). Martin and Laun pleaded guilty and *nolo contendere*, respectively (R. 629, 685). Boehm was convicted after trial and his conviction was affirmed on appeal (see *Boehm* v. *United States*, 123 F. (2d) 791 (C. C. A. 8), certiorari denied, 315 U. S. 800.

to remove Egan, Boehm, and Laun from office and succeeded in obtaining their resignations on May 16 (R. 452–453, 714–718, 969–971). These former officers were continued at their former salaries until the end of 1939 and were provided with offices to carry on Union's defense against the Securities and Exchange Commission investigation (R. 453–455, 524, 647, 683, 829–831, 888). In January 1940, Spoehrer made a full disclosure to the Securities and Exchange Commission of the expense account padding and insurance rebates (R. 821–827). Egan and Boehm, who were implicated in the affidavit, were then dropped from the pay roll (R. 455–456, 990–992, 1081–1082).

The evidence tending to prove Egan's participation in the conspiracy may be summarized as follows:

From 1926 to April 1938 Egan, with the approval of the officers of North American, received a salary of $1,500 per year as president of the Union Colliery Company, a subsidiary of Union Electric, for the express purpose of enabling him to make political contributions to national political committees as president of the Company (R. 522, 723, 727, 740, 799, 843, 848–853, 1001, 1116, 1134–1141). He did make such contributions in 1936 and in March 1938 (R. 727, 852, 1143). Boehm kept him generally informed of his activities with respect to political contribu-

tions (R. 843, 853, 878–879, 892–893) and discussed a few specific contributions with him (R. 843, 878–879). In fact, after Egan had expressed disapproval of the amount sought by one candidate, Boehm contributed a lesser amount (R. 878–879). On two occasions, in 1936 and 1938, Boehm's secretary delivered to Egan a total of $4,500 from the slush fund kept by Boehm in his safe (R. 805, 1161). Egan was generally informed of the means by which the slush fund was created (R. 843, 853, 855–856). He knew of the ten percent rebate on insulator purchases (R. 262, 844, 1123–1124). He and Boehm were largely responsible for the compensation of the attorneys, and he was informed of the "kick-back" arrangements with at least some of the attorneys (R. 854–855). In 1937, Egan participated in a conference with Boehm and Fogarty of the North American Company at which Boehm presented a summary of Union's expense accounts and a statement showing the benefit to the Company from the defeat of inimical bills. Boehm testified that at this conference Fogarty expressed his approval of the practice of creating a fund by padding expense accounts. (R. 866.)

During the course of the Securities and Exchange Commission's investigation, officers of the Company spoke to Egan and were told by him to "sit tight"; that the Company "would stand" back of them (R. 428, 442–443, 447, 464, 680).

Egan was present at some of the conferences during which Boehm disclosed his activities to Lincoln and Lundgren (R. 883–884), and he was present when Hamilton and Alschuler discussed means by which they could account to the Commission for the large cash withdrawals resulting from the "kickback" arrangement (R. 317, 323, 353–354). When Emberson, an employee who had been called to testify before the Securities and Exchange Commission, stated at a conference which Egan attended that he was afraid he could not account for the padding of his expense accounts, Egan suggested that his expenditures could be accounted for as the expense of luncheon conferences with his subordinates (R. 471, 479-480). On January 7, 1940, Spoehrer's affidavit implicating Egan was read to Egan, Boehm, Lincoln, and Lundgren, and Egan did not challenge or deny the charge (R. 441–443, 826).

Egan took an active interest in the fate of proposals for municipal ownership of power plants (R. 628–629, 1103) and legislation which affected the Company's interests (R. 764–767. 844–845, 897–898). He attended at least one session of the Missouri legislature in 1933 (R. 567, 1125). When Boehm found North American officials unwilling to expend $300,000 for the passage in 1933 of the Indeterminate Permit Bill which the Company favored, Egan himself spoke to an officer of the North American Company

about the matter (R. 845, 1031). Egan asked Laun to effect the passage of a bill controlling the use of motor boats on Union's Lake of the Ozarks (R. 676–677). He admitted maintaining "friendly contacts" with public officials and taking part in the Company's picnics and other affairs at which public officers were entertained (R. 760–764, 1127–1128).

In 1934 Boehm asked Laun to make a study of the election results in each county in Missouri over a ten- or fifteen-year period, to be used as a basis of a program of political expenditures distributed *pro rata* among the utility companies operating in Missouri (R. 673, 858). In May 1934 Egan presided at a meeting of utility executives at Union's Administration Lodge at Bagnell Dam (R. 675, 769–773, 780, 858, 1112, 1124–1125). The difficulties of the utilities in the previous session of the Legislature were discussed and Boehm presented his plan for systematic financial aid to candidates throughout the state (R. 769–773, 779–781, 858).

ARGUMENT

We respectfully submit that the only question of substance raised by the petitions is that of the constitutionality of Section 12 (h). No other question raised by the petitions warrants consideration by this Court.

1. To assist the Court in determining whether certiorari should be granted on the constitutional question, we point out the grounds for concluding that, although the issue raised is important, Section 12 (h) is clearly constitutional under the decisions of this Court. Moreover, the constitutionality of Section 12 (h) does not turn on the involved questions argued in the petitions.

In *Electric Band and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, this Court upheld the constitutionality of Sections 4 and 5 of the Act, which require that holding companies must register if they use the mails or channels of interstate commerce, or if they own securities of subsidiary companies which use the mails or such channels. The activities of The North American Company, Union Electric and the subsidiaries of Union Electric in interstate commerce and through the mails make it clear that they are as fully subject to federal control as was Electric Bond and Share. Union Electric and its subsidiaries transmit electricity across state lines (GX 7–9, R. 223–224, 951); a subsidiary ships coal across state lines (R. 951); Union Electric serves industries in its three-state area which are of nation-wide importance. North American and Union Electric use the facilities of interstate commerce for communication and other-

wise in order that the former may exert its control over the latter (R. 807, 842, 853, 993, 1007, 1111), and both companies have sold large security issues in interstate commerce. *Union Electric Company of Missouri,* 4 S. E. C. 65; *The North American Company,* 4 S. E. C. 434; *The North American Company,* Holding Company Act Release No. 4565 (Sept. 17, 1943). Therefore it avails petitioner nothing to argue the possible application of the Act to registered holding companies or their subsidiaries not actually engaged in interstate commerce, if there are any such. It will be time enough to decide the constitutionality of such regulation when, if ever, it arises.

The prohibition of political contributions may be viewed as an incident of the comprehensive statutory regulation of interstate utility holding-company enterprises, to the end that their integrity shall be maintained. But it is unnecessary to consider the validity of the statutory plan as a whole, for Section 12 (h) may be sustained on narrower grounds.

a. The pattern of the regulation constitutes a Congressional finding that political contributions directly affect interstate commerce, even though, as the petitioners state, there is no express finding by Congress in that regard. This is made plain by the declaration in Sec. 1 (c) that "it is hereby declared to be the policy of

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this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce."[5] After this declaration Congress included in the Act the prohibition of political contributions contained in Sec. 12 (h). In the light of Sec. 1 (c) it is clear that Congress found that political contributions by registered holding companies and their subsidiaries directly affect interstate commerce and involve the evils enumerated in Sec. 1 and are, therefore, within the federal power. Among these evils are those recited in Sec. 1 (b) (5): lack of economy and lack of effective public regulation. It needs no argument to show that both of these evils may flow from a course of political activity.

These Congressional findings will not be overturned, of course, unless they are clearly unreasonable. It certainly is not unreasonable to expect that political contributions by companies as

[5] The findings supporting this declaration of purpose appear in Sec. 1 (a) and (b). Sec. 1 (b) declares that the national public interest is affected by certain evils relating to holding companies and their subsidiaries, and Sec. 1 (a) recites that such public interest comes from interstate activities of holding companies and their subsidiaries and from lack of effective state regulation of their interstate activities.

closely tied into interstate commerce as these companies will have a material effect on that commerce. In fact, the argument made by the Union Electric Company in the court below (see R. 1236) that the political use of the company's money was favorable to the interests of consumers for the reason that bills disadvantageous to the company were defeated and bills advantageous to its interest were passed, resulting in a saving to the company of approximately two and one-half million dollars annually, is itself an admission that the political activity had a substantial effect on the company's business which, as we have pointed out above, is an interstate business. It is difficult to understand the argument of the lack of a substantial effect on interstate commerce when it is at the same time claimed that the activity has so substantial an effect on the finances of the company. As the court below recognized (R. 1236), whether these effects are deemed salutary or harmful to the public interest was for Congress to decide.

b. Section 12 (h) is likewise constitutional as an exercise of the commerce power in aid of the domestic policies of the states, policies which the Act makes a part of the federal scheme of regulation of interstate commerce. Sections 6 and 7 regulate security issues and Sections 9 and 10 regulate acquisitions of utility assets and utility securities by registered holding companies and their subsidiaries. We believe that we may safely

start with the premise that these sections are a constitutional exercise of federal power.[6]

In these particulars Congress has made the administration of the federal policy dependent on state regulation. Thus Section 6 (b) directs the Commission (by rules, regulations or order, and subject to terms and conditions) to exempt from the standards of Section 7 a security issue of a subsidiary of a registered holding company which has been expressly authorized by the State Commission of the state in which such subsidiary company is organized and doing business. Section 9 (b) contains a similar exemption applicable to acquisitions of public utility assets or of public utility securities where the acquisition has been authorized by the State Commission.

Since the effectiveness of the federal policy under the commerce power is thus made dependent on effective state control, we submit that Section 12 (h) is constitutional as a use of that power in aid of the domestic policies of the states, that is, to preserve their operations from domination or corruption.[7] As the statement of facts above shows, despite the fact that the State of Missouri has forbidden political contributions by corporations for many years,[8] Union Electric for

[6] In 8 years of the administration of the Act, during which the Commission's jurisdiction pursuant to these sections has been exercised in hundreds of situations, their constitutionality has not been challenged.

[7] See 79 Cong. Rec. 10557–10560.

[8] Revised Statutes of Missouri, 1939, Section 11,786.

over a decade subsidized political campaigns of candidates for a wide range of offices in the State of Missouri, legislative, executive, and judicial. If conditions like these were permitted to go unchecked, the reliance which the Act places on effective regulation by the State of Missouri in order to accomplish the ends of Congress would be frustrated. Use of the federal power in aid of the domestic policies of the states under these circumstances, we submit, is clearly constitutional. Cf. *Brooks* v. *United States,* 267 U. S. 432; *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Co.,* 299 U. S. 334; *In re Rahrer,* 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420.

In brief, our view on the constitutional issue is that although the specific problem is here raised for the first time, the decision below is correct and is in accordance with precedents established by this Court.

2. Union Electric Company contends (Pet. 12–15) that the trial court erred in instructing the jury as to the test to be applied in determining its corporate responsibility for the acts of its officers. It is, however, well established that a corporation is responsible for the illegal acts of its officers performed for the benefit of the corporation in pursuance of the business of the corporation. *New York Central R. R.* v. *United States,* 212 U. S. 481, 492–496; *Mininsohn* v.

United States, 101 F. (2d) 477, 478 (C. C. A. 3); *Zito* v. *United States,* 64 F. (2d) 772, 775 (C. C. A. 7); *Joplin Mercantile Co.* v. *United States,* 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 236 U. S. 531. The court instructed the jury to this effect in a charge which paraphrased the language of this Court in the *New York Central R. R.* case, *supra* (R. 1185–1186, 1189).[9] The facts which bring the activities disclosed by the evidence within the scope of this rule are so well summarized in the decision of the circuit court of appeals (R. 1247–1251) that to repeat them here would be supererogatory. In the present case the corporate officers were endeavoring to procure reduction of taxes, favorable public relations and

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[9] The extent and nature of legal liability for the performance of an act forbidden by a federal statute is a federal question, to be determined in accordance with principles established in the federal courts. Cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95; *Deitrick* v. *Greaney*, 309 U. S. 190, 201, 202. Even if Missouri law were to be applied, however, the same principles of liability would pertain. *Connell* v. *Haase & Sons Fish Co.*, 302 Mo. 48, 87–88 (1923); *Fensky* v. *Casualty* Co., 264 Mo. 154, 160–164 (1915); *State ex inf. Crow* v. *Firemans Fund Ins. Co.*, 152 Mo. 1, 38–39 (1899). Cf. *State ex inf. Hadley* v. *Delmar Jockey Club*, 200 Mo. 34 (1906); *State ex inf. McKittrick* v. *American Insurance Co.*, 346 Mo. 269 (1940). Indeed, on the very facts of the present case a Missouri court held Union Electric liable for the payment of a fine in *quo warranto* proceedings. *State of Missouri* v. *Union Electric Company of Missouri*, Circuit Court of St. Charles County, Mo., No. 18065, May 26, 1941.

friendly legislation, all legitimate corporate ends. This activity was admittedly entrusted to the direction of Boehm and Laun (R. 763, 1112). To effect that aim a large secret fund was put at Boehm's disposal. The corporation cannot, on the plea of ignorance and lack of authorization, escape liability for illegal acts performed by managing officers so employed and so authorized.

3. Egan's contention that his conviction on the conspiracy count was based on an erroneous test of liability (Pet. 14, 27–29) is without merit. The instructions given to the jury embody the very theory which he propounds as the correct rule of law. The trial judge specifically charged the jury that Egan was guilty only if, with knowledge of the unlawful agreement, he "actually participated" therein; that mere knowledge of the illegal acts and failure to prevent or expose them was insufficient to warrant conviction (R. 1188). The circuit court of appeals in its opinion (R. 1246–1247) accepted this rule of law and concluded on the basis of the evidence that the jury was justified in finding Egan's actual participation. The evidence (see Statement, *supra*) amply justifies the conclusion of the jury and of the circuit court of appeals that Egan's conduct amounted to more than mere knowledge and acquiescence, that there was informed and interested cooperation and stimulation. See *Direct Sales Co.* v. *United States,* No. 593, October

Term 1942, decided June 14, 1943. It is thus evident that this aspect of the case involves merely a reconsideration of the sufficiency of the evidence to support Egan's conviction and does not present a proper question for consideration by this Court. *United States* v. *Johnston,* Nos. 4 & 5, October Term, 1942, decided June 7, 1943; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

4. Egan's petition presents the further question whether the words "in connection with" as used in Section 12 (h) were properly interpreted by the trial judge in his charge to include contributions made in contemplation of the candidacy of the recipient (Pet. 11–13, 24–27). The charge was, we submit, clearly proper. Since many activities "in connection with" nomination, election or appointment to office are carried on before the candidacy is officially announced, no arbitrary rule can fix the time when a person becomes a candidate for an office. In this case the jury was not told that contributions to officeholders were necessarily made in connection with their candidacies; it was instructed that if it found as a fact that the money was given in contemplation of the candidacy, the contribution would fall within the prohibition of the statute, otherwise not (R. 1187). The charge therefore properly presented to the jury an issue of fact for their determination.

In any event, the charge did not constitute reversible error. The contributions by way of insurance brokerage fees, about which Egan complains, were a very minor part of the conspiracy disclosed by the evidence. The conspiracy proved obviously contemplated contributions to candidates actually running for office. There was no evidence connecting Egan directly with the payments to office holders.[10] On the other hand, there was evidence of his direct connection with contributions to particular candidates and of his own contributions to national committees (see Statement, *supra*). If Egan was a party to the conspiracy, and the jury has found that he was, he was a party to an agreement to make contributions to candidates and to political parties. Hence, even if the charge were erroneous, it would not present grounds for reversal. Cf. *Douchan* v. *United States,* 136 F. (2d) 144, 147–148 (C. C. A. 6), certiorari denied, No. 1033, October Term, 1942; *Clarke* v. *United States,* 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Martin* v. *United States,* 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Britton* v. *United States,* 60 F. (2d) 772, 773–774 (C. C. A. 7), certiorari denied, 287 U. S. 669; *Burn-*

[10] Egan's assertion that this aspect of the charge was important in his conviction because the contributions were made from the rebates to which Spoehrer testified is frivolous. The effect of Spoehrer's affidavit was merely to show that Egan had knowledge of the general practice, not of the specific details of his activities (see R. 826).

stein v. *United States,* 55 F. (2d) 599, 607 (C. C. A. 9), certiorari denied, 286 U. S. 550.[11]

CONCLUSION

The decision below is correct. It presents no conflict of decisions and, aside from the constitutional question raised, no question of general importance. If this Court deems the constitutional question of sufficient importance to warrant the granting of writs of certiorari, we respectfully submit that review should be limited to that question.

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NOVEMBER 1943.

[11] The remaining issues raised by Egan's petition (Pet. 7, 15) are not argued in his brief since he concedes that they are not of sufficient importance to warrant a writ of certiorari. The alleged errors assigned were disposed of in the opinion of the circuit court of appeals (R. 1251–1255).

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(31)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 410.

LOUIS H. EGAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

THOMAS BOND,
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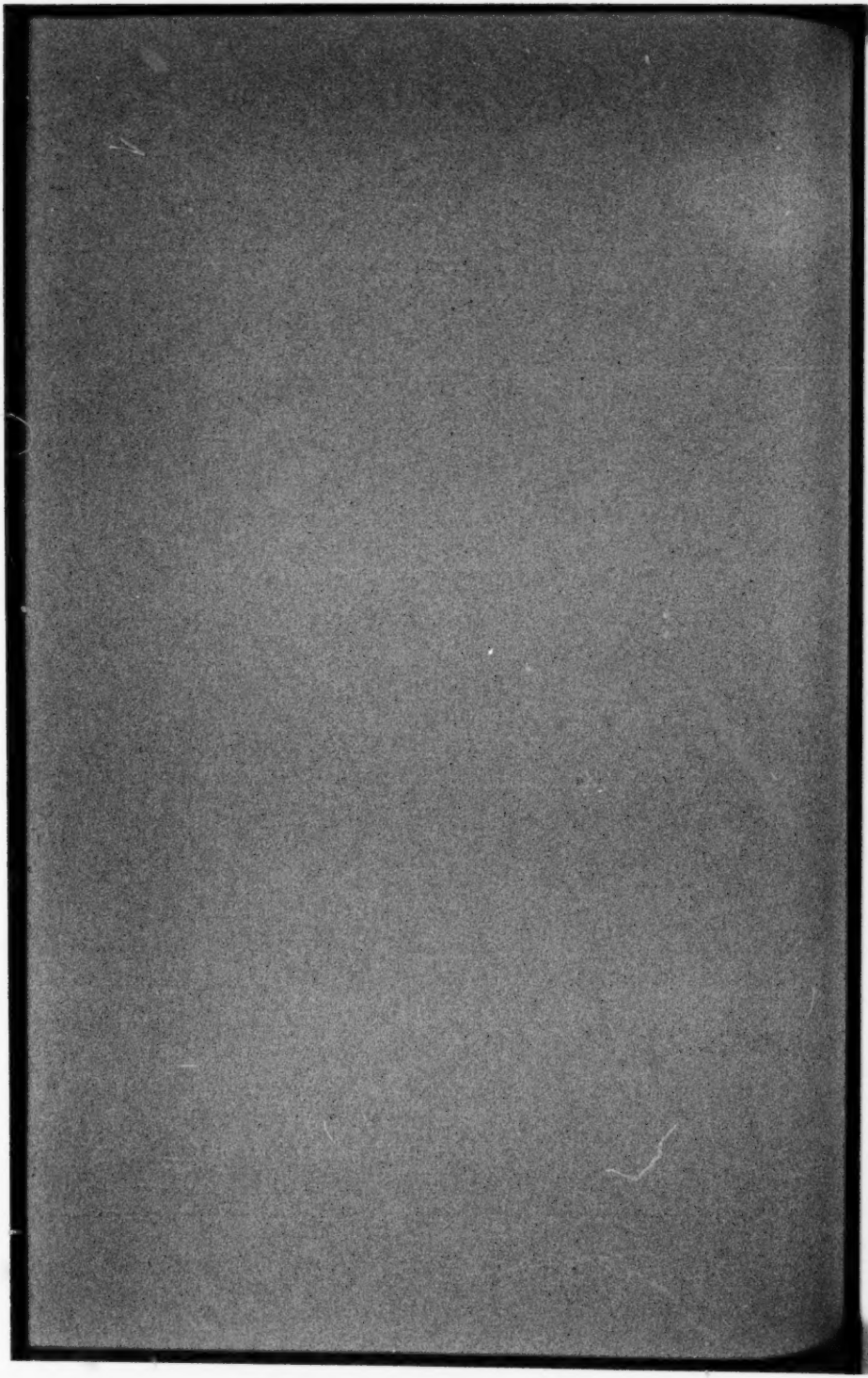

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REPLY BRIEF FOR PETITIONER.

I.

Constitutional Questions.

The brief in opposition concedes that the constitutional question is important (Gov. Brief 14), and that it is here raised for the first time (Gov. Brief 19). It does not deny that this issue is of sufficient general importance to warrant certiorari. It takes issue with the petitioner on the

merits of the question, contending that Section 12-H is a valid exercise of the commerce power. We say it is not, and we find in the brief in opposition no satisfactory answer to our attack on the validity of this section.

1) The brief in opposition says first that the objection that the Act includes companies not engaged in interstate commerce is not available to petitioner because Union Electric Company is engaged in interstate commerce (Gov. Brief 14, 15). This Court, however, has in similar situations repeatedly held otherwise (U. S. v. Reese et al., 92 U. S. 214, syl. 4 and 5, l. c. 220-222; James v. Bowman, 190 U. S. 127, l. c. 140-142; Employers' Liability Cases, 207 U. S. 463, l. c. 496-502). These cases all rule that where a criminal statute is in general language broad enough to cover acts without as well as within the Congressional power, it is invalid in its entirety, except where parts of it can be saved under the doctrine of separability. As said in the Reese case (l. c. 221):

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

In the Employers' Liability cases the language of the act was broad enough to include liabilities not arising in interstate commerce, and the act, not being separable, was held to be invalid. So, in this case, Section 12-H includes any registered holding company or subsidiary irrespective of whether or not it is engaged in interstate commerce. As pointed out in our petition, the inclusion of companies not engaged in interstate commerce is beyond the power of Congress under the commerce clause, and invalidates the section.

2) While conceding that the Act contains no express finding that the intrastate contributions to candidates at state and sub-state elections affect interstate commerce, the brief in opposition argues that "the pattern of the regulation," as set out in Section 1 of the Act, constitutes such a finding (Gov. Brief 15). In support of this argument the brief in opposition points to Section 1 (b) 5, concerning lack of economy in management and lack of effective public regulation. The obvious lack of relationship between these abuses and political contributions might well be debated. A more fundamental answer, however, is the fact that, if any such relationship could be inferred, it would not follow that Congress had made any finding that the prohibitions of Section 12-H affect interstate commerce. The Congressional findings, in respect to interstate commerce, are contained in Sub-section A of Section 1 of the Act, and are enumerated under five heads, and these findings do not include political contributions. The recitals in Sub-section B of Section 1 of abuses detrimental to the public interest evidence merely the motives and purposes which caused Congress to enact the legislation, not the facts upon which Congress based its power to so enact. These latter facts are found in Sub-section A of Section 1. They are the facts upon which Congress based its jurisdiction under the commerce power, and they do not include intrastate political practices prohibited by Section 12-H, nor anything having any relation to such practices. We say, therefore, that the argument in opposition on this point is wholly without merit.

3) Finally, the brief in opposition seeks to sustain the Act as "in aid of the domestic policies of the states" (Gov. Brief 17), the argument being that because sub-section B of Section 6, and sub-section B of Section 9, exempt certain security issues and the acquisition of certain assets from the provisions of Sections 7 and 10, respectively, when

approved by state commissions, that, therefore, Congress may legislate as to any matter that may affect the independence and integrity of state governments. We submit the mere statement of such a proposition is sufficient to refute it. None of the cases cited (Gov. Brief 19) support any such theory of federal power.

II.

Statement.

We cannot accept the Government's statement as fairly reflecting the evidence on the issue of Egan's alleged participation. The Government's own witnesses exonerated Egan from any participation in the accumulation or disbursement of the funds, or the contributions to candidates—see testimony of Laun (R. 690-1-2); Spoehrer (R. 432, 486); Miltenberger (R. 304, 466); Irish (R. 505); Emberson (R. 476); Avery (R. 460); Boehm (R. 895, 843, 893); Hamilton (R. 324); Alschuler (R. 360); and Fowler (R. 312).

The following, from Laun's cross-examination, is typical of the testimony of all these witnesses (R. 690):

> "I started padding my expense account along about 1933 or 1934, because Mr. Boehm, my superior officer, instructed me to do so. I never received any instructions from Mr. Louis Egan to pad my expense account, and never during the years from 1934 to 1938, and to the end, reported to Mr. Louis Egan that I was doing so. All the money thus accrued was delivered by my secretary to Mr. Boehm. None of it went, directly or indirectly, to Mr. Egan.
>
> "The transactions I had with Fowler, Hamilton, Alschuler and McMillan were made at Mr. Boehm's direction. The refunds back from them to Boehm were made at Boehm's direction. I never received any instruction from Louis Egan to get refunds from any of those attorneys, and had no occasion to report to Mr. Egan that I was doing so.

"The distribution of funds I made to politicians was done at the direction of Frank Boehm. In each instance I went to his office to get the money. I never received any instructions from Mr. Egan to make those contributions, and had no occasion to report to Mr. Egan that I was doing so."

The circumstantial evidence relied on to prove participation was all either incompetent or consistent with innocence.

The arrangement for the Union Colliery salary (R. 1116-7) was too remote in point of time to prove connection with the conspiracy (Crowley v. U. S., 8 Fed. [2d] 118, 9th Cir., Syl. 1, l. c. 119; Clark v. U. S., 61 Fed. [2d] 409, 5th Cir., Syl. 4).

In 1926, when the above arrangement was made, there was no plan then existing for political contributions, nor any public utility act—22 C. J. S., Crim. Law, Sec. 764, note 11. Further, the salary was discontinued December 31, 1937 (R. 851, 1038, 1117, 619), and the Government's own evidence shows that no contribution was made by Egan after the Act became applicable to Union Electric, and while he was receiving a salary from Union Colliery Company.

The North American Company registered February 25, 1937 (R. 213); therefore, the 1936 contributions were prior to the Act becoming applicable to Union Electric. The 1938 contribution was made after the salary had ceased (R. 851, 1038, 1117, 619), and it is only when transactions are continued after the law prohibiting them takes effect that acts or conduct prior thereto are admissible (Nyquist v. U. S., 2 Fed. [2d], 6th Cir., 504; Bailey v. U. S., 5 Fed. [2d], 5th Cir., 437, l. c. 438, par. 1 and 2).

There was not a shred of evidence that Egan had any knowledge of or part in the arrangement between Boehm and Keller whereby the discount on the insulators was returned to Boehm in cash (R. 285, 286, 304, 305, 1111). Likewise, there was no evidence whatever as to why or

for what purpose Boehm claims to have sent Egan $4,500 (R. 805, 1161), nor any evidence that Egan had any knowledge of the source of these funds. Those alleged payments are wholly unexplained, and we submit that the bare fact that Egan may have received this money is entirely consistent with innocence (Linde v. U. S., 13 Fed. [2d] [8th Cir.] 59, l. c. 61; Dickerson v. U. S., 18 Fed. [2d] 887, 8th Cir., l. c. 893; McLaughlin v. U. S., 26 Fed. [2d] 1, l. c. 3, pars. 5, 6).

There were two meetings of Missouri utilities at Bagnell Dam in 1934. There is some question whether Egan was present at the one at which Boehm unfolded his plan for political contributions (R. 777, 779, 1112). All Government witnesses present at the meeting, however, testified that nobody agreed with Boehm and no plan was entered into (R. 675, 770, 771, 773).

The interest which Egan took in public relations and public ownership movements and proposed legislation affecting the interest of the utility was all open and aboveboard. He told the SEC about it (R. 763), and described it in his own testimony (R. 1112, 1113). There is no evidence that he had any part whatever in the undercover work of Boehm and Laun.

The testimony referred to by the Government, to the effect that during the SEC investigation, after the alleged conspiracy was over, Egan spoke a word of advice or encouragement to old employes under investigation tends to prove no more than knowledge or the means of knowledge. There is not a word or deed attributed to Egan in any of these conversations that can be said to be an act in furtherance of, or participation in, the alleged conspiracy. In short, there is to be found in this record no substantial evidence that Egan, either by word or deed, ever actively participated in these unlawful activities which went on under Boehm's direction (Turcott v. U. S., 21 Fed. [2d], 7th Cir., 829).

III.

Conflicts With Decisions in Other Circuits.

There being, as we have above pointed out, no sufficient evidence of active participation on Egan's part, the verdict was in conflict with the trial court's instructions (R. 1188). The Court of Appeals did not accept the law as declared in these instructions (R. 1188), and supported by decisions in at least six Federal Circuits (Egan Pet. 14, 27-29). It restricted the rule to certain limited situations, to wit (R. 1246):

> **"Where the accused is not in some beneficial, responsible or interested relation to the conspirators and their activities, and where the activities of the conspirators consist of a single or but a few transactions, mere knowledge, acquiescence and indifference will be insufficient, in the absence of some word or deed, to connect him with the conspiracy. Authorities relied upon by Egan, supra."**

No such limitation as the above quoted is to be found in the cases we cite from the other Circuits (Egan Pet. 14).

The opinion below then proceeds, "on the other hand," to state a different rule to apply to this case, omitting the element of participation.

We respectfully submit that in thus limiting the rule, the opinion below conflicts with the other cases cited (Egan Pet. 14); and in its statement of the rule to apply to this case it likewise conflicts. A comparison of the opinion below (R. 1246-7) with the opinion of the Court of Appeals in the Ninth Circuit in Weniger v. United States (47 Fed. [2d] 692, l. c. 693), and the opinion of the Court of Appeals for the Seventh Circuit in Turcott v. United States (21 Fed. [2d] 829), makes the above conflicts clear.

IV.

Construction of Section 12-H.

On the question of the construction of Section 12-H the Brief in opposition says "no arbitrary rule can fix the time when a person becomes a candidate for an office" (Gov. Brief 22). But, even so, in a prosecution for making a contribution to his candidacy, there must be proof that he did, in fact, become a candidate. The fact that a candidacy was contemplated is not enough.

In this case there is no proof in the record that the officeholders in question ever, in fact, became candidates, or even that a candidacy was in contemplation at the time of these payments, and hence the instruction was not only a misconstruction of the statute, but was wholly unsupported by any evidence.

There is no merit in the Government's contention that this matter was not important in Egan's conviction. The insurance agents testified that they made these payments to these officeholders at Spoehrer's direction (R. 406, 587-97). Spoehrer described these payments as part of the insurance practices he engaged in at Boehm's direction (R. 430), and the Government was permitted to introduce in evidence Spoehrer's affidavit, in which he stated: "I verified the fact that Mr. Egan knew about these transactions" (R. 442, 826). It was all thus part of the chain of evidence by which it was sought to convict Egan of conspiracy.

We submit that the Court's charge to the jury (R. 1187) was reversible error.

V.

The Court Should Not Limit the Scope of the Review.

We most earnestly oppose the suggestion in the concluding paragraph of the brief in opposition (Gov. Brief 24), that the review on certiorari be limited to the constitu-

tional questions. The conflicts of decision and the question of statutory construction are also of sufficient importance to warrant the writ.

The other questions which we raised (Egan's Pet. 15) constitute serious error prejudicial to petitioner. Believing that this Court desires the preliminary papers on certiorari to be short and concise, we did not argue these latter points further than to raise them so that, on the writ being granted, we would not be precluded from urging them as additional grounds for reversal (Rule 38, part 2). In view of the Government's suggestion, however, some enlargement becomes necessary.

(a) **Instruction No. 14** (R. 1175; Egan's Assignment of Error No. XLVII, R. 160). Evidence had been received that Egan made contributions to the Republican National Committee in 1936 and in 1938. The latter contribution was pleaded as an overt act in the indictment (R. 22). Egan testified that these contributions were personal and made from his own money (Opinion below, R. 1257, 1116-7, 1099). It was the Government's theory that they were made from funds of the Union Colliery Company (R. 726). The Opinion below ruled that this was a jury question (R. 1246). Instruction No. 14 sought to submit Egan's theory on this issue. The opinion below brushes the point aside with the statement (R. 1257): "The jury was not called upon under the conspiracy count to determine whether Egan personally violated Section 12-H of the Act." We submit, however, that the jury was called upon, under the conspiracy count, to determine whether or not Egan had participated in the conspiracy. It was by these contributions that it was sought to be proved that Egan was a party to, and had committed an overt act in furtherance of, the conspiracy. It was a link in the chain by which he was sought to be connected with the conspiracy.

The requested instruction fairly presented Egan's

theory on the issue raised by this evidence. It was not covered anywhere else in the Court's charge, and its refusal was reversible error.

(b) **Mortimer's testimony re Egan's expense account and Government's Exhibit 115-A** (R. 782-5; Egan's Assignment of Error No. XI, R. 80). This testimony, and this exhibit, in so far as it related to Egan, was hearsay and inadmissible, and the opinion below so rules (R. 1253). We submit it was also prejudicial and should have been held to be reversible error (see Egan's petition for rehearing, pp. 9, 10; R. 1269-1270, where this point is argued). This testimony attributed dishonesty to the defendant. It impeached his credibility as a witness. It contained a sinister suggestion that he was tied up in some way with the expense account padding which constituted such an ugly feature of this case. We submit that its reception, against objection, was reversible error.

(c) **Political practices of North American Light & Power Company** (Egan's Assignment of Error XXI, R. 123, 1001-4). This Assignment of Error, although briefed and argued, was not mentioned in the opinion below—see Egan's Petition for Rehearing (R. 1270). This collateral and irrelevant testimony should have been excluded. It did not tend to prove Egan's motive or intent because he had no part in it [15 C. J. S., Conspiracy, Sec. 92 (e), p. 1145]; being a recital of purely collateral facts with which Egan was in no way connected, it was inadmissible under the rule "res inter alios acta" (22 C. J. S., Crim. Law, Sec. 603, p. 926; 32 C. J. S., Evidence, Sec. 576).

(d) **Spoehrer's Confession** (Egan's Assignment of Error No. X, R. 76, 441-3, 821-7). The accused's mere silence when the confession of an alleged accomplice is read to him and others is insufficient to make it admissible in evidence against him, unless it is further shown that the cir-

cumstances were such as to call for a denial on his part, and to afford him an opportunity to make it (22 C. J. S., p. 1310, notes 54, 55, 56, 57). There was no such showing in this case. See U. S. v. Harris, 45 Fed. (2d), 2d Cir., 690, syl. 5, l. c. 691, pars. 5, 6; Di Carlo v. U. S., 6 Fed. (2d), 2d Cir., 364, syl. 1, l. c. 366; People v. Friedman, 98 N. E. (N. Y. Apps.) 471. Unless some compromising word or act is elicited from the accused on the reading of the confession of an alleged accomplice, the statement is only binding on the party making it, and is not admissible against the accused. No such word or act was elicited from Egan. All the witness (Spoehrer) could say was, "I don't believe Mr. Egan made any comment" (R. 443). A copy of the affidavit was not given to Egan until it was read at the meeting (R. 434, 441). Spoehrer and his attorney held the meeting (R. 429). Spoehrer related what he had done in Washington (R. 429) and his attorney read the affidavit (R. 434). No comment was called for and there is no proof that any opportunity for comment was offered.

In addition to the objections to this affidavit noted in the opinion below (R. 1252) objection was also made on behalf of Egan that "there was no obligation on the defendant to deny it" (R. 821). We submit that the Spoehrer confession was not binding on Egan, and its admission in evidence against him was reversible error.

We submit that if certiorari is granted petitioner should be permitted to urge the errors above reviewed. The Court's jurisdiction on certiorari is the same as on "unrestricted writ of error or appeal" (28 U. S. C. A., Sec. 347). The only limitation on the scope of the review is Rule 38, part 2, limiting same to the questions specifically brought forward by the petition for the writ. We have specifically brought forward each of the above questions in our petition (Egan Petition 3, 7, 15). This is a criminal case in which petitioner's liberty is at stake; we do not

believe that in such a case this Court, if it takes jurisdiction, will refuse to examine errors duly specified and which deprived petitioner of a fair trial. We know of no criminal case in which the review has been so limited.

This petitioner's life has been useful and successful and filled with worthy achievements (R. 1108-9, 1101). His character and reputation are attested by the leading citizens in the community (R. 967, 1011, 1122). These things strengthen the presumption of innocence (Linde v. U. S., 13 Fed. [2d], 8th Cir., 59, syl. 4, l. c. 61, par. 4, 62).

We ask that the writ be granted as prayed.

Respectfully submitted,

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Attorney for Petitioner.

(32)

IN THE

SUPREME COURT OF THE UNITED STATES.

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UNION ELECTRIC COMPANY OF MISSOURI,
Petitioner,

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Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY FOR PETITIONER

To Brief for the United States in Opposition.

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November 11, 1943.

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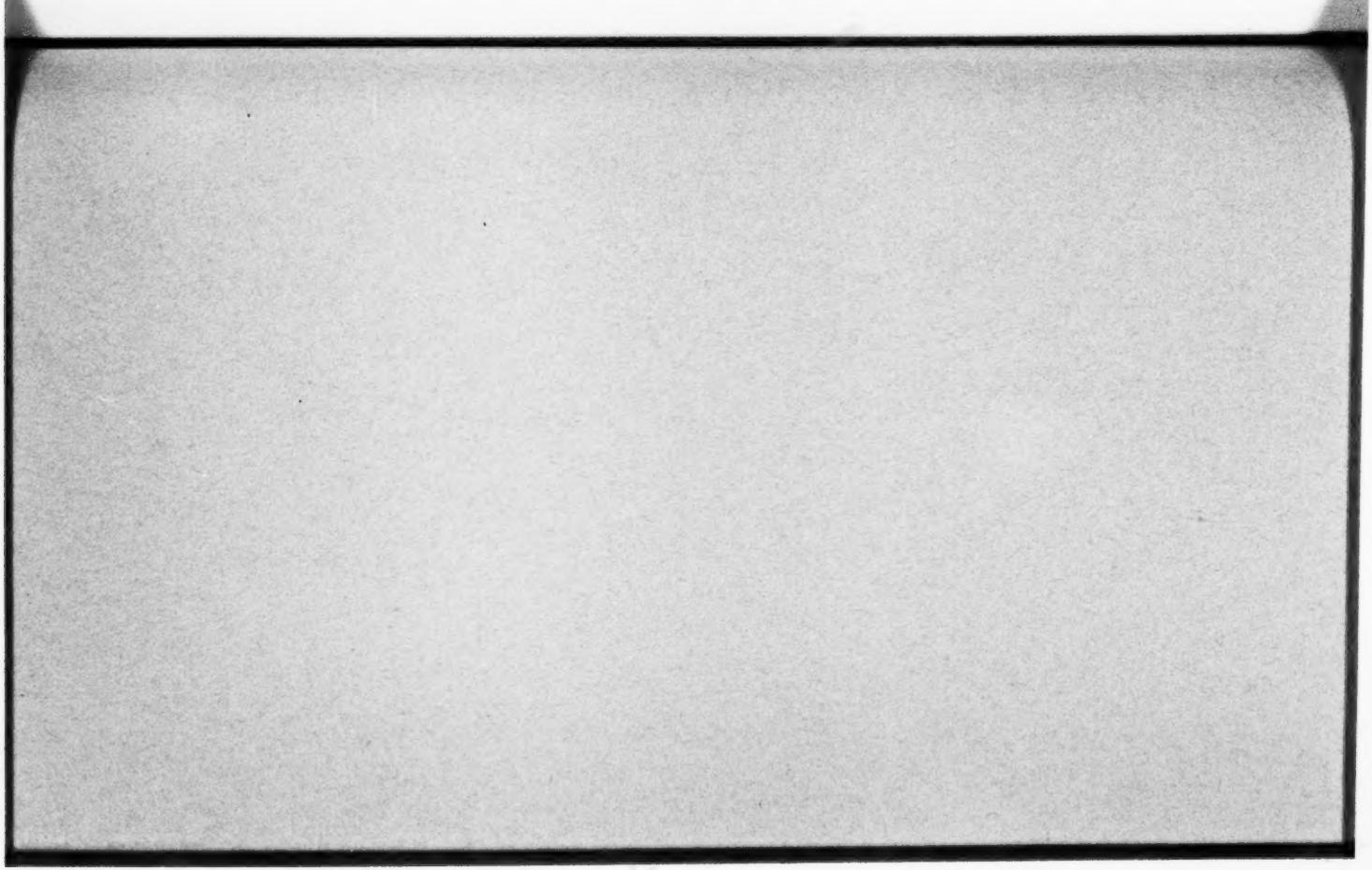

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To Brief for the United States in Opposition.

A few of the points made in the brief in opposition, submitted on behalf of the United States, are such that comment may be of assistance in appraising the questions presented by the petition for issuance of the writ. Confining ourselves to those few points we submit this reply.

I.

As to the Constitutionality of the Statute.

Because of the fact that petitioner and certain of its affiliated companies are engaged in interstate commerce, counsel for the United States assert, in effect, that the ap-

plication of the prohibitions of section 12 (h) of the act to companies not engaged in such commerce is not pertinent to the constitutional questions here involved. They say that "it will be time enough to decide the constitutionality of such regulation when, if ever, it arises" (Brief, p. 15).

In that respect, we submit, their definition of the constitutional question is not maintainable in view of these factors:

> (1) Section 12 (h) is applicable, by its terms, to every registered holding company and to every subsidiary company thereof; and neither the definitions in section 2 (15 U. S. C., §79b) of the Act nor the provisions of section 4 (15 U. S. C., §79d), requiring registration as a condition of engaging in any of the activities there enumerated, confine the descriptive terms to those companies which actually engage in interstate commerce.
>
> (2) So far as concerns the class of companies to which the provisions of section 12 (h) are applicable there is no question of separability.

Therefore, the question presented is not limited by the evidence showing that petitioner is engaged in interstate commerce. Whether or not Congress might have imposed such prohibitions upon companies so engaged, it did not so limit the application of this statute. What is in question is the power of Congress to impose the comprehensive prohibition which this statute, by its terms, imposes, not the power to impose such prohibitions in the narrower field marked out by the evidence in this case.

> *James v. Bowman*, 190 U. S. 127;
> *United States v. Reese*, 92 U. S. 214.

The brief in opposition names several factors as indicating a relationship between contributions for political purposes and interstate commerce. The only one of these upon

which we need comment is that stated at page 17 of the brief, referring to an argument said to have been made by petitioner in the court below. Counsel are mistaken in the statement (at page 17 of the brief in opposition) that Union Electric Company argued below

> "that the political use of the company's money was favorable to the interests of consumers for the reason that bills disadvantageous to the company were defeated and bills advantageous to its interest were passed, resulting in a saving to the company of approximately two and one-half million dollars annually * * *."

No such argument was made on behalf of Union Electric Company in either of the courts below, nor was it ever asserted on behalf of the company that there had been such a saving, or any saving, to the company by reason of the political use of its money. Apparently counsel for the United States have been misled by the part of the opinion of the Circuit Court of Appeals wherein that Court stated that such an argument had been made. The Court of Appeals said "* * * it is argued"—and then recited the argument to the effect stated in the brief of counsel for the United States. It is true that such an argument was made, but on behalf of the Government, not on behalf of Union Electric Company.[1]

---

[1] The statement by the Circuit Court of Appeals that Union Electric Company profited by the illegal expenditures to the extent of more than two and one-half million dollars annually (R. 1236) is based upon the testimony of the two officers of the company (not parties to this action) who had carried out the illegal scheme. One of them, Laun, was permitted to testify, over petitioner's objections that in 1937 he had computed the amount which the company would have lost had the Missouri Legislature passed, at its 1937 session, all of the bills which he had opposed, and that the figure at which he arrived was "somewhere between a million and a half and two million dolars a year" (R. 677-678, 679). The other former officer, Boehm, referring in his testimony to that computation by Laun, said that "it showed that the bills, if passed, would have added about two and a half million dollars a year to the expenses of Union Electric Company (R. 866).

II.

The Question as to the Test of Agency.

This is not the question, stated in the brief for the United States (p. 3), "whether petitioner * * * is liable for the acts of its officers in making political contributions in violation of 12 (h)." It is the question whether the court below applied a correct test of the agency essential to such liability.

The decision of the Court of Appeals upon this question is appropriate matter for review by this Court for several reasons. There are few Federal decisions in criminal cases in which the test of a corporation agent's authority has been defined. There are none, so far as our research discloses, involving the elements present in this case. Recently there has been an increase in the number of cases in which corporations are charged with crime. Definition by this Court of the test applicable to the evidence in this case would serve an important purpose.

Moreover, the opinion of the Circuit Court of Appeals in this case is based upon what is said to be the effect of this Court's decisions in *New York Central H. R. R. v. United States*, 212 U. S. 481. If the Circuit Court of Appeals has misinterpreted and misapplied the decisions in the case cited, as we think it has, its error in that respect should be corrected, especially in view of the fact that pertinent decisions upon the point are so few.

The test of the alleged agency of petitioner's officers who made the contributions in this case should have been formulated in view of these factors:

(1) That there was no evidence of express authorization to make political contributions and that the general authority of officers was only such as generally pertained to their offices (By-Laws, Art. III, §3—R. 930).

(2) That the powers and purposes of the corporation as defined in its charter (R. 229-233, 235-237)

did not include political activity of any sort and that political contributions were positively placed beyond the sphere of allowable corporation activity by the statutes of Missouri (R. S. Mo. 1939, §5346—R. S. Mo. 1929, §4941), wherein petitioner was incorporated.

Notwithstanding these facts, of course, the corporation could have so authorized the making of political contributions in its behalf as to subject it to legal responsibility. But no such authorization may be implied from the mere fact that the persons who made the contributions were its officers.

Yet the trial court, in the part of its charge quoted and approved by the Circuit Court of Appeals (R. 1247-1248), told the jury that petitioner should be found guilty if the contributions were made by named persons, acting "as officers" and "on behalf of, **or** for the benefit of" petitioner—and this, although such action was "not within the officers' or agents' corporate powers" (R. 1185-1186).

In the brief in opposition to the issuance of the writ (at pp. 20-21), as in the opinion of the Circuit Court of Appeals (R. 1250-51), the action of the officers in making the contributions is related to their authority to act for the corporation in opposing disadvantageous legislation, in cultivating its "public relations" and in protecting the company against excessive tax assessments. Because the contributions had or might have had advantageous effects in those fields, the Circuit Court of Appeals concluded that they were within the field of activity in which petitioner's officers were authorized to act for it.

The vice of that reasoning is that it leaves out of account the subject matter of the acts in question. Assuming that the motive of those who made the contributions was to cultivate friendly relationships which would be of advantage at a later time does not answer the vital question. The question is whether the subject matter of the act is one

with respect to which the officer has been authorized to represent the corporation. The subject matter of the act was the making of the contribution, and that subject matter was not included in the general authorization vested in the petitioner's officers. An officer of a corporation may not adopt any means he may choose to accomplish a benefit to a corporation. The subject matter of the act which he chooses as a means must itself be within the field of his authorized activity.

The question which we seek to have the Court pass upon is confined to the test of agency, as defined in the opinion of the Circuit Court of Appeals. The test adopted is inconsistent, we submit, with the decisions of this Court in the two cases cited in our petition (*New York Central & H. R. R. v. United States*, 212 U. S. 481, and *Washington Gas Light Co. v. Lansden*, 172 U. S. 534).

Conclusion.

For the reasons stated, both the constitutional question and the question as to the test of petitioner's responsibility for the unlawful acts involved are of such importance that the decision of the Circuit Court of Appeals upon them should be reviewed by this Court.

Respectfully submitted,

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